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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO C. et al.,

Defendants and Appellants.

F034910

(Super. Ct. No. 41558)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County, Joseph A. Kalashian, Judge.

Mary Rafani for Defendant and Appellant Francisco C.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant Santos C.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Stan Cross and Patrick J. Whalen, Deputy Attorneys General, for Plaintiff and Respondent.

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**STATEMENT OF THE CASE**

On May 3, 1999, an amended information was filed in Tulare County Superior Court charging appellants Francisco C. and Santos C. as follows: as to Francisco, count I, continuous sexual abuse of a child under the age of 14 years (Pen. Code, § 288.5), and

as to Santos, counts II and III, commission of lewd or lascivious acts on a child under the age of 14 years (Pen. Code, § 288, subd. (a)). As to counts II and III, it was also alleged that Santos suffered three prior serious and/or violent felony convictions within the meaning of the three strikes law, and three prior serious felony convictions within the meaning of Penal Code section 667, subdivision (a). Appellants pleaded not guilty and Santos denied the special allegations.

On October 12, 1999, Santos filed a motion to exclude evidence of prior uncharged offenses. On the same day, the prosecution filed opposition and argued the evidence was admissible pursuant to Evidence Code sections 1101 and 1108.

On October 13, 1999, appellants' joint trial began with motions in limine and jury selection. The court denied Santos's motion to exclude the prior uncharged offenses. On October 14, 1999, the court denied Francisco's motion to exclude his prearrest statement to the police. The court also denied Santos's motion to dismiss the jury panel pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258. On October 19, 1999, the court denied Francisco's motion to strike the victim's testimony. On October 20, 1999, the court granted Santos's motion to dismiss count II pursuant to Penal Code section 1118, and denied Francisco's motion to dismiss count I.

On October 22, 1999, the jury found Francisco guilty of count I, continuous sexual abuse, and Santos guilty of count III, commission of a lewd or lascivious act. On October 25, 1999, the court found the special allegations as to Santos to be true.

On January 12, 2000, as to Santos, the court imposed the third strike sentence of 25 years to life for count III, commission of a lewd or lascivious act. As to Francisco, the court imposed the midterm of 12 years for count I, continuous sexual abuse.

On January 31, 2000, appellants Santos C. and Francisco C. filed timely notices of appeal.

## **FACTS**

Linda C., born in 1990, lived with her mother, Lourdes S. and her siblings. She had three sisters and three brothers.

Appellant Santos C. is Linda's father. Santos lived with his girlfriend and did not live with Lourdes and the children. Linda stayed with Santos and his girlfriend on the weekends and in the summer. Santos paid child support for Linda, but Lourdes and Santos occasionally argued about the timeliness and amount of child support.

Juana C. is the mother of both appellants Santos and Francisco, and she is Linda's paternal grandmother. Appellant Francisco lived with his mother, Juana, and his two sisters. Linda knew Francisco as her uncle "Poncho."

Linda frequently visited her grandmother and stayed overnight at her house during Christmas and other holidays. When Linda stayed with her grandmother she usually slept on the couch or the floor of the living room. At the time of trial, it had been several years since Linda had stayed at her grandmother's house.

Linda testified that appellant Francisco had touched her private parts on several occasions during her visits to Juana's house. Linda recalled the last incident occurred when she stayed at her grandmother's house during Christmas 1997 when she was seven years old. On this occasion, Linda was lying on her grandmother's bed and watching television. Francisco was sitting on the other side of the bed and speaking on the telephone. It was daytime, and no one else was home. When Francisco finished the telephone conversation, he closed the bedroom door and returned to the bed. He pulled down Linda's pants and underwear and told her to lay on her back, and pulled down his own pants. Linda testified Francisco leaned over her body and touched her front private parts with his front private parts. Linda described the touching as lasting "a while." Francisco did not say anything, and Linda was not in pain.

Linda testified that during this same incident, Francisco told her to turn over on the bed. Francisco then touched Linda's "butt" with his front private parts, and moved

his body around as he touched her. The incident ended when the doorbell rang. Francisco pulled up his pants and answered the door, and Linda put her clothes back on.

Linda testified that Francisco performed these touchings at least 10 times. Each incident occurred the same way, and always happened when she stayed at her grandmother's house. She was not sure whether Francisco touched her "butt" on more than one occasion, but she was certain that he touched her front private parts on numerous occasions. Francisco never touched Linda at her own house. The touchings generally occurred in the daytime, when no one else was present in the house. Linda testified that Francisco had been touching her since she was four years old, and she could not remember the first time it happened. Francisco usually pulled her pants all the way down, but sometimes he only pulled the pants down to her knees before he touched her. She never saw his private parts, but she could feel his private parts touch her body. Francisco never spoke to her about the incidents.

Linda testified that her father, appellant Santos, had also touched her. Linda testified about an incident which occurred when she was eight years old. Linda had been staying with Santos and his girlfriend. Santos had a fight with the girlfriend, and Santos and Linda left the house and stayed overnight with Santos's friend. Linda and Santos slept in the same bedroom, which belonged to the friend's daughters. Linda slept on the lower half of a bunk bed, and Santos slept on the floor. She recalled the sheets and blankets were pink. Linda testified that after she fell asleep, she woke up in the middle of the night and realized that Santos was getting into her bed. Linda testified that Santos got on top of her in the bed and pulled down her pajama pants. Linda was lying on her stomach. Santos removed his clothes and rubbed his front private parts on her "butt," over her underwear. Santos then removed Linda's underpants, and again rubbed her "butt" with his front private parts. Linda testified the touchings did not hurt, and Santos did not say anything to her.

Linda testified she was not certain whether Santos had touched her on more than one occasion. Linda testified that she frequently dreamed about the incident on the bed, as though Santos was touching her on more than one occasion. Linda became afraid of Santos after she had the dreams. However, Linda knew that a dream was not something that really happened. Linda continued to visit Santos after he touched her, even after she had the dreams.

Linda testified that she told her sister, Rosalina, about Francisco's touchings when she was younger, and before the last incident occurred with Francisco in Christmas 1997.<sup>1</sup> Linda did not tell her mother and other sisters about the incidents until they brought up the subject. Her mother and sisters were talking with her, and her sister Rosalina mentioned that Linda had told her about Francisco's touching several years earlier. Linda's mother asked if Francisco did anything to her, and Linda said yes. Linda testified she was embarrassed when she told her family about the touchings. After Linda told her mother about the incidents, her mother called the police.

Areana S. (born in 1982) was Linda's half-sister. Areana knew appellant Santos when he was her mother's boyfriend, about nine or ten years before trial. At that time, Santos lived with Areana and her mother for about two years. Areana testified that Santos repeatedly molested her when he lived with the family.<sup>2</sup> The molestations began when Areana was six or seven years old, and occurred "[m]any times. Too many times to even remember." Areana testified that Santos removed his clothes and she removed her

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<sup>1</sup> On direct examination, Linda testified she told Rosalina about the incidents when she was younger. On cross-examination, Linda testified that she could not remember telling Rosalina about the incidents, but Rosalina told her about their conversation which occurred when she was younger.

<sup>2</sup> As will be discussed in part VI, *infra*, the trial court held Areana's testimony was admissible pursuant to Evidence Code sections 1101 and 1108.

clothes. Santos rubbed his private part against her vagina and “butt,” and lubricated his private part with saliva. Santos also had Areana perform oral sex on him “[s]o many times I don’t remember.” No penetration occurred during these acts.

Areana testified Santos molested her early in the morning at their house when Areana’s mother was at work and the other children were still asleep. Areana eventually told two family friends about the incidents. She later told her brother, sister (Rosalina), and her mother, and her mother called the police. A police report about Santos’s molestation of Areana was prepared in May 1990, when she was eight years old, but no charges were filed. These incidents occurred both before Linda was born, and when Linda was an infant. (Linda was born in 1990.)

Areana testified she was present when Linda told their mother that Santos had molested her. Their sister, Rosalina, was also present. Areana testified the conversation occurred when the family noticed that Linda did not want to visit Santos anymore, and they asked Linda if something had happened. When Linda told the family about the molestations, Areana tried to comfort Linda and told her, “‘You’re not alone, it happened to me, too.’” Areana called the police after Linda told them about the molestations.

Lourdes S., the mother of Linda and Areana, testified about Areana’s conversation with her in 1990 when Areana revealed that Santos had touched her. Santos was living in the house with Lourdes and Areana when this conversation occurred. Later that day, Lourdes spoke with Santos and asked him about Areana’s accusation, and Santos said it was not true. Lourdes testified she “persisted until he himself said it was true.” Lourdes testified Santos said, “Yes, he said yes, but he wanted for me to bring [Areana] so that he could ask for forgiveness so that she could see that he repented from that and I would forgive him.” Santos “just said, ‘Okay. Forgive me.’” Lourdes testified she called the police and reported the molestation, and an officer interviewed Areana. While a police report was filed, Lourdes testified that criminal charges were not brought against Santos.

Lourdes testified that she learned about the molestation of Linda when the family noticed that Linda did not want to visit Santos anymore. Linda would cry when she had to visit her father, and Lourdes, Areana, and Rosalina spoke with her. Lourdes asked Linda if anyone had touched her at her grandmother's house. Linda covered her face and initially said no. Lourdes asked if she was embarrassed, and Linda said she was. Linda subsequently told the family about the molestations. Lourdes asked Linda if she was “‘sure that this is true? No one told you to say this?’ [¶] ‘No, mom, but don’t ask me anymore, because I’m embarrassed.’”

After Lourdes called the police, Juana (appellants’ mother and Linda’s grandmother) contacted Lourdes and begged her to have Linda withdraw the report. Lourdes replied that she could not assure the grandmother that it was true, but there was nothing she could do about it because Linda made the report and said it happened.

Rosalina S. is Linda’s older half-sister, and had lived with Linda all her life. Rosalina was 15 years old at the time of trial. Rosalina testified that Linda told her something when Linda was three or four years old. Rosalina thought she told her mother about the subject of Linda’s conversation, but her mother later said that she never knew. Linda never mentioned it again, and Rosalina never again discussed the topic with Linda.

Rosalina testified about another conversation they had in early 1998, when she asked her mother to speak to Linda about something. Rosalina testified she never told Linda what to say about the incidents. Rosalina testified that her mother called the police after Linda told them. As they waited for the police to arrive, Rosalina, Areana, and their mother asked Linda to tell them everything that happened. Rosalina testified that she reminded her mother that she had told her about Linda’s statement when they were younger, but her mother did not remember. Linda was not present during this conversation between Rosalina and their mother.

Rosalina testified the family later took Linda to the police station, but they were not present for her interview. Linda was very upset after the first half of the interview,

and seemed scared and nervous. The officer told them that Linda did not want to talk. When the family went to lunch during the break, neither Rosalina nor anyone else in the family asked Linda about the interview or told her what to say. Rosalina testified that after lunch, Linda completed the second half of the interview and she looked relieved that “she finally said everything.”

### **Linda’s interview**

Tulare County Sheriff’s Detective Ralph Martin conducted the investigation into Linda’s allegations against appellants Santos and Francisco. On March 3, 1998, Detective Martin arranged for Linda to be interviewed by the Child Abuse Response Team (CART). The interview was conducted by Amy Jennings of CART, in a room with a hidden videocamera and a two-way mirror. The camera and microphone were arranged so the investigating officers could communicate with Ms. Jennings through an earphone to suggest questions to ask the child victim, but the victim was unaware of the presence of the investigators in the other room.

Detective Martin observed the interview, and testified that Ms. Jennings initially tried to establish a rapport with Linda and explained the importance of telling the truth. Detective Martin testified that Linda was very alert and responsive during this portion of the interview. When Ms. Jennings asked about the molestation allegations, Linda’s head went down and she would not answer. Her voice was so low that they could not understand what she was saying. After about 30 minutes, the investigators decided to stop the interview because they “were just making it rougher on the child.” Linda left the interview room and rejoined her mother and sisters. Detective Martin told them that Linda did not want to talk about the case, but instructed them not to discuss the case during lunch or get Linda wound up. “We wanted her to calm down. So that’s one reason why we took the long lunch.” The family agreed and they left for lunch.

Detective Martin testified that Linda and her family returned about 90 minutes later, and the CART interview continued in the interview room. During this interview,



Linda appeared more relaxed and ready to go forward with the questions. As Linda described the molestations, she drew on diagrams to demonstrate what happened to her. Detective Martin testified that Linda clarified that no penetration occurred during the molestations. The investigators relied on this information when they decided not to subject Linda to a sexual assault examination in order to avoid further psychological trauma to her.

The videotape of the CART interview which Ms. Jennings conducted with Linda was played for the jury, and the 73-page transcript has been filed with this court. During the first portion of the interview, Linda was very reluctant to speak with Ms. Jennings about the molestation allegations. Linda said something had happened to her “[l]ots” of times. Ms. Jennings asked who did something to her, and Linda replied: “My dad and my uncle, my dad and my uncle.” Ms. Jennings asked who did something to her first, and Linda replied: “My uncle,” and it happened when she was “smaller.”

Ms. Jennings explained the difference between “good touches and bad touches” to Linda. Ms. Jennings gave her a diagram of a child, and asked her to draw on the area where she was touched by her uncle. Linda marked the front pelvic area and the buttocks. Ms. Jennings asked if her uncle touched her “butt” on the outside or inside of her clothes, and Linda replied on the inside, and more than one time. Linda also said she was embarrassed to talk about it. Ms. Jennings asked Linda to use another diagram to show which part of her uncle’s body touched her, and Linda marked his private parts.

Linda was unable or unwilling to give audible responses for most of this portion of the interview, and either nodded her head or whispered her replies. Ms. Jennings knew how hard it was for her, and said they would take a break for Linda to be with her mother and sister. The lunch break described by Detective Martin then occurred.

After the break, Ms. Jennings asked Linda about lunch with her family, and reminded Linda they were talking about something that happened with her dad and her uncle. Ms. Jennings produced the diagrams and asked Linda to talk about her uncle.

Linda said something happened with her uncle “a lot, lots,” and it was more than 10 times but less than 20 times.

Linda could not remember the first time, but she remembered the last time occurred at Christmas in her grandmother’s room while she was watching television. Linda explained she was staying at her grandmother’s house, and no one else was home but her uncle. Linda explained she was lying on her grandmother’s bed and watching television, and her uncle was sitting on the side of the bed and on the telephone. Ms. Jennings gave Linda two dolls and asked her to act out the incident. Linda said her uncle got off the telephone and shut the door, he took off his pants “all the way to his knees,” and he laid on top of her. Linda thought he “was wearing boxers,” and he “told me to turn around this way,” which was face down. Linda said he “[o]pened” her legs, but she did not want to describe any more of the incident: “I don’t want to do it.” Ms. Jennings encouraged Linda to finish the story, and Linda said, “He laid on top of me.” Ms. Jennings asked about Linda’s underwear, and Linda said, “He pulled them down too,” and then he “put his thing in mine.” Linda indicated that he did it to her “butt.” The incident ended when her aunt arrived home and knocked on the door, and her uncle put his pants back on. Linda did not tell her aunt because she was “scared and . . . embarrassed” about the incident.

Linda stated this incident was the last time her uncle did something to her. On previous occasions, her uncle always did the same thing and “slide his thing” into her “butt,” after he removed her pants to her knees. The incidents occurred in the daytime at her grandmother’s house, when no one else was around. Sometimes her uncle asked Linda to touch him, but “I keep [*sic*] on saying no.” Linda thought her uncle started to touch her before she was in kindergarten. He never told her not to tell anyone and never held her down, but once he held her hands while she was on her back.

Ms. Jennings asked Linda how the police found out about the touchings. Linda replied she was “so embarrassed and my mom was really serious so I had to tell her.”

Her mother asked if her uncle had been touching her because “my sister was . . . thinking and, and cause my uncle touched her too . . . and she was thinking about me . . .” Linda did not hear her sister talking to her mother about Francisco’s conduct toward her, but her sister told her about it.

“[Linda]: I used to tell my sister that uhm my uncle used to touch me.

“[Ms. Jennings]: When did you tell your sister that?

“[Linda]: When I was about Kinde. . . I don’t know.

“[Ms. Jennings]: When you were littler though?

“[Linda]: Yeah, when I was littler.

“[Ms. Jennings]: Which sister did you tell?

“[Linda]: Rosa. [¶] . . . [¶]

“[Ms. Jennings]: . . . [D]id you tell Rosa first or did she tell you first about your uncle touching?

“[Linda]: That’s something I can’t remember.

“[Ms. Jennings]: You can’t remember. Okay. Did your uncle do the same thing to her?

“[Linda]: I don’t know.

“[Ms. Jennings]: You don’t know. Okay. Okay you know what, we have a new rule.

“[Linda]: What.

“[Ms. Jennings]: You and your sister can’t talk about what happened to you uhm to each other, okay.

“[Linda]: Okay.”

Ms. Jennings asked Linda to talk about the touchings from her father, Santos. Linda said she used to visit Santos, and something happened twice. The first time occurred when Linda and her father stayed overnight at a friend’s house, along with her

aunt, uncle, and grandmother. They were all sleeping on the floor, and Linda accidentally kicked her father with her feet. Santos “took his pants off,” “kind of past his knees,” and he “put his thing in mine.” Ms. Jennings asked Linda to demonstrate with the dolls, and Linda showed she was on her stomach and “[h]e had put my legs, got up a little, down on top of me, he holds his hands on the floor.” Linda said he put “his thing” in her “butt,” but someone else in the room woke up and “he got up . . . put his pants on then he laid back down.” Linda could not remember what happened to her own clothes during this incident.<sup>3</sup>

Linda said the second time happened when she was staying with her father and his “other wife,” and they had a fight. Her father packed their clothes and they left without his “other wife” and stayed with another friend. At the friend’s house, Linda slept on a bed and her father slept on the floor.

“[Ms. Jennings]: Okay what happened next?

“[Linda]: You know when it got dark, he, he was on the bed, I had my clothes on, then his thing in mine but I had my clothes on.”

Linda said her father “pulled [her] pants down,” “pulled his pants down . . . to his knees” and “opened my legs,” then he “put his thing in mine” and he moved his body “back and forth.”

Ms. Jennings asked Linda if there were other times when her father touched her, or touched her in a different way, and Linda said no. Linda said no one else had touched her like that. She told her sister about it just before the police came to their house. Linda said she felt better now that she had told them about it.

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<sup>3</sup> Santos was charged with two counts of committing lewd or lascivious acts against Linda. Linda’s description of this incident was the basis for count II. However, Linda did not testify to this incident at the trial, and the court granted Santos’s motion to dismiss count II.

### **Francisco's interview**

After the completion of Linda's CART interview, Detective Martin tried to contact Francisco and left a message for him at his mother's house. About three days later, on April 6, 1998, Francisco called Detective Martin and agreed to an interview.

On April 9, 1998, Francisco met Detective Martin at the sheriff's department, and the interview was conducted in a conference room. Francisco was 20 years old at the time of the interview. Detective Martin told Francisco he was not under arrest, he did not have to answer any questions, and he could leave at any time. After building some initial rapport, Detective Martin turned to Linda's allegations and asked if he touched her. Francisco stated that he did not touch Linda. Detective Martin replied the investigation showed "there was no doubt that he did." Francisco did not give an answer.

Detective Martin testified he asked Francisco how he thought it happened, and the reason it happened. Martin also asked whether something happened to Francisco in the past in order to give him a reason to justify what he did. Francisco replied "that when he was a child living in Mexico, he was molested by the priest in his village." Francisco explained that he was seven years old, and the priest would take him into a secluded area and have him perform acts of oral copulation. Detective Martin replied that it was terrible, but he did not promise to obtain help for Francisco. Detective Martin testified that he never promised to obtain help for Francisco if he told him something, and denied that he showed the police reports to Francisco.

Detective Martin testified that after Francisco told him the story about the priest, Martin again turned the conversation to Linda, and asked him what happened. Martin testified that Francisco said "he was talking on the telephone on his mother's bed. Linda was laying on the bed also. When he finished talking on the telephone, Linda rolled over and got up on top of him and started kissing." Francisco said he grabbed her "butt" while she was on top of him, and rubbed his penis against her clothing and bare skin. Francisco admitted he had three or four such contacts with Linda, from the time she was five years

old until she was seven years old. Francisco was only able to recall the specific incident in his mother's bedroom, and he could not recall the first instance of inappropriate touching.

Detective Martin testified that once Francisco admitted the molestations, he "gave him the crutch that it may not have been his fault for what he did, because of something that happened to him in the past, that's he's not a bad person or evil person. He's a good person that just needs some help[.]" and Francisco might have transferred what happened to him to Linda. However, Martin did not promise Francisco that he would not go to jail, and did not promise to get him help or place him on probation. Martin did not tell Francisco that his mother would be hurt if he went to jail. Martin did not show Francisco the police reports, or give him details about Linda's accusations.

Detective Martin testified that after Francisco made these disclosures, Martin asked to conduct the interview again so he could tape-record Francisco's statement. Francisco agreed and Detective Martin turned on the tape recorder. Detective Martin testified he never made any promises to Francisco before he turned on the tape recorder. Martin told Francisco that he was not a bad person and "he does need help," but he never promised to get him help in exchange for a statement. He never showed Francisco the police reports which contained Linda's statements.

After Martin started the tape recorder, he tested the machine and ran the tape back to make sure it worked. After the test, he rewound the tape and restarted the machine, and conducted the interview on tape. He used an audiotape which recorded 30 minutes on one side, and he tried to keep the interview to 30 minutes so he would not have to break the atmosphere to change the tape. Detective Martin testified the tape recorder remained on for the entire scope of the interview, and he never turned it off until the interview was completed.

At trial, the tape recording of Detective Martin's interview with Francisco was played to the jury. The jury also received a redacted transcript of the interview. In the

tape recording, Martin notes that Francisco was free to leave, and they had already been discussing Linda's allegations prior to turning on the tape. Martin also mentions they had discussed something which happened to Francisco involving the priest. Francisco states the priest repeatedly forced him to perform acts of oral copulation, and he was afraid to tell anyone about the molestations. Martin asked Francisco if he thought the priest's conduct had anything to do with "what you did to Linda," and Francisco replied that he did not know because he never talked about the priest with anyone.

As the tape-recorded interview continued, Detective Martin asked Francisco to talk about what happened with Linda, and whether he remembered the most recent incident. Francisco proceeded to describe the incident which occurred when Linda stayed at her grandmother's house during the Christmas holiday. Francisco stated he was sitting on the bed with Linda. He was on the telephone and she was watching television. When Francisco finished the telephone call, "she got on top of me" and "I grabbed her ass" over her clothes. Francisco then lowered his pants and rubbed his penis on her legs. Martin confronted Francisco with some conflicts between his story and Linda's account, and said he thought Linda was very truthful. Francisco denied that he touched Linda on 20 different occasions, and thought "it was only like three or four times." However, Francisco admitted that he rubbed his penis on her vagina or buttocks, but insisted the acts occurred over Linda's underwear.

Francisco told Martin that he "caught myself" each time because he "thought about it that was wrong." Martin asked Francisco if the incidents were accidents or something that just happened. Francisco replied that he did not know why he did it because Linda was "just a little girl and she doesn't excite me." Martin said that it "goes back to something way back," and asked Francisco's age when he was molested by the priest. Francisco replied he was seven years old, and admitted that Linda was seven or eight years old when he first touched her.

Martin said that he did not think the priest did it deliberately to Francisco, and he did not think Francisco was “a mean evil person, but I do think that you as we discussed earlier that you do need some help.” Francisco replied he did not want to talk about it, but Martin said he had to deal with it because it actually happened: “And you . . . can stick your head in the sand, it’s not gonna [sic] do you any good. It’s time to stick your head out of the sand and get on with life because burying . . . your head in the sand is not going to help you one bit.”

As the tape-recorded interview continued, Martin asked Francisco how many times he touched Linda, and Francisco said it was three to five times at the most, and the incidents occurred in the daytime. Francisco admitted he touched her one time under her clothes, and each touching lasted less than a minute. He touched her three or four times over her underwear. He denied any acts of oral copulation. After the last incident, Francisco apologized to Linda and promised never to touch her again. He never threatened or scared her, or told her not to tell anyone. Francisco said he never planned to touch her, but it just happened. Martin asked what Francisco would say to Linda if she was present. Francisco replied that he loved her very much “and that I’m really, really, really sorry, I mean. I don’t know feel [sic] to know that I took about what happened to me.”

As the interview concluded, Martin asked Francisco if he had been treated fairly, or promised or threatened to say anything. Francisco replied that it had been hard to talk about something he had not thought about in a long time, referring to the priest. Francisco also said Martin had not threatened or promised anything to get his statement.

### **Santos’s interview**

Detective Martin interviewed Santos on May 6, 1998, in the same conference room at the sheriff’s department. Santos received Detective Martin’s message and agreed to the interview, and drove to the department on his own. Detective Martin did not advise Santos of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436



because Santos was not under arrest. However, Detective Martin informed Santos he was free to leave and did not have to answer any questions if he did not want to. Santos did not leave and agreed to continue the interview.

As with Francisco, Detective Martin tried to build rapport with Santos, then informed him about the nature of the investigation and that Linda said he had inappropriately touched her. Martin told Santos “there was no doubt there was inappropriate touching between him and his daughter Linda.” Martin testified that Santos “[d]idn’t say or do anything. He just sat there” for a few seconds. Martin repeated the statement, and Santos again made no response.

Detective Martin testified that he asked Santos how he thought it happened. Santos again made no response. Martin then mentioned that Francisco revealed he had been molested by a priest when he was a child, and asked Santos whether he had also been molested by the same priest. Santos replied that he was, but he did not give any details about the priest. Santos seemed upset about having to talk about the incident with the priest.

Detective Martin again confronted Santos with Linda’s allegations, and Santos replied that he did not think it happened. Santos also stated that he believed his ex-wife had Linda make the allegations because they had fought about child support. However, Santos described an incident which occurred when he had an argument with his wife or girlfriend. He left the house with Linda and spent the night at his boss’s house. Santos said he slept on the floor while Linda slept on the bed in the same room. Detective Martin testified to Santos’s statement:

“At some point during the night he got up in bed with Linda and got behind her and hugged her. He says that it was nothing inappropriate about the hug he gave her, and then he said he felt uncomfortable about it and got back out of bed and went back to the floor.”

Santos said he did not take off Linda's clothes, and he kept his clothes on. Santos denied that he placed his private parts against her "butt" or anywhere on her body. Detective Martin conceded Santos denied the allegations at least four times during the interview.

Detective Martin testified that Santos appeared to be under a lot of pressure and stress when he spoke about being in bed with Linda. He was upset and at one point had tears in his eyes. After the completion of the interview, Detective Martin did not arrest Santos and he was allowed to leave. Martin did not tape-record his interview with Santos.

### **Defense evidence**

Appellant Santos C. did not testify at trial and did not present any defense evidence.

Juana C., the mother of appellants Francisco and Santos, testified on Francisco's behalf. Juana stated that she spoke with Linda's mother about the molestation allegations. Juana asked Linda's mother if she could withdraw the charges against Francisco and Santos. Linda's mother said no, and "that her other daughters were the ones in charge of it. That they would kill her if she did." Juana testified that Linda's mother said Santos was innocent. On cross-examination, Juana conceded that Linda's mother also said that she did not know if Santos was innocent or not, but she just knew what Linda was saying.

Appellant Francisco C. testified about his interview with Detective Martin, and that they initially bonded by talking about sports. Detective Martin confronted Francisco with Linda's allegations and asked for his version. Francisco denied touching Linda. Martin replied they were investigating the case and he believed Francisco did it, and wanted to hear his story. Francisco again denied it.

Francisco testified that Detective Martin said, "[Y]ou know you have done it and we know you [have] done it. We want to know why and how." Francisco had nothing to say, but Martin said they believed the same thing had happened to Francisco. Martin

said that he believed Francisco had been molested as a child. Martin also said that he had been molested by a teacher when he was younger. Francisco testified that he had previously kept the incident to himself, but decided to tell Martin that he was molested by the priest when he was a child.

Francisco testified that Detective Martin sympathized with him, and said that sometimes an individual passes on the molestation to someone else, and again referred to Linda's charges. Francisco testified he again denied that he touched Linda.

Francisco testified that he eventually admitted that he touched Linda, but he lied and it was not true. Even though he never touched her, Francisco testified that he decided to claim he did:

“Because Detective Ralph Martin at the time, he had told me that if I didn't cooperate with him, that I would go to state prison or jail, which at the time I didn't know the difference. And if I would talk with him, with whatever he had told me, then he will see that I will get the less time possible, which was probably one weekend or community service at the most, that he would talk to the judge and this would never come to jury.”

Martin told Francisco that he was not a mean person, and promised to speak to the judge so he would receive, at most, community service or a weekend in custody. Martin also said that if Francisco did not talk, “then the jury would -- I didn't want them thinking that I had done it. That's why -- that would have been the reason why I kept quiet, because I didn't want to incriminate myself.” Francisco testified Martin said that if he did not say anything, the jury would hear it and believe he incriminated himself.

Francisco testified he believed Martin and had trusted him with the secret about the priest even though he had never told his mother about the priest's conduct. He believed that Martin would help him, and agreed to admit that he touched Linda. Martin showed the police reports to Francisco so he could learn what Linda had said about the incidents. “So after that he said to basically to say whatever the report said” so he could start the interrogation on the tape recorder.

Francisco testified that after Martin read him the police reports several times, Francisco admitted that he molested Linda. While the police report stated there were 20 incidents of molestation, Francisco changed the number at Martin's suggestion and only acknowledged three to five incidents.

Francisco acknowledged that he gave a narrative account of the molestation on the tape recorder, but testified he lied about it and got the information from the police report. Francisco testified that he admitted the acts because Martin threatened he would go to prison or jail for a long time. Martin also told Francisco that his mother would suffer if he went to prison for a long time. Francisco testified that Martin made these threats and promises before he turned on the tape recorder.

Francisco testified that Martin eventually turned on the tape recorder and asked him questions based on the police reports. However, Martin turned off the tape recorder and again went over the statements in the police reports, and told Francisco to "work with him" and answer the questions exactly as in the reports. Martin turned the tape recorder back on and they completed the interview.

Francisco testified his entire confession to Martin was a lie, and he was never on the bed with Linda, never got on top of her or touched her, and never molested her. Francisco admitted he lies when it is convenient for him to avoid trouble. However, he just made the statements on the tape because he "thought about my mother and I thought everything that could've happened to me. Basically the main thing was my mother, because, once again, I love my mother dearly, and I didn't want to put my mother through any pain." Francisco conceded that the tape-recorded interview ended with Martin asking whether he had threatened or promised him anything in exchange for the confession, and Francisco said no. However, Francisco testified that he answered no "because I was looking at him and he nod[ded] his face -- when he ask[ed] me the question, he also gave me the answer, not with his voice, but with body language," which told Francisco to say no.

Appellant Francisco C. was found guilty of count I, continuous sexual abuse, and sentenced to the midterm of 12 years in prison. Appellant Santos C. was found guilty of count III, commission of a lewd or lascivious act. Santos waived a jury trial on the special allegations, and the court found all allegations to be true. The court denied Santos's motion to dismiss the prior strike convictions. Santos was sentenced to the third strike term of 25 years to life.

On appeal, appellants Francisco C. and Santos C. raise separate issues. Francisco contends there is insufficient admissible evidence to support his conviction, as the trial court should have granted his motion to strike Linda's testimony because of her inability to independently recollect the alleged molestations. Francisco also contends the trial court should have granted his motion to exclude the prearrest statement he gave to Detective Martin, because it was elicited by threats, promises, and coercion.

Santos contends the trial court should have granted his *Wheeler* motion to dismiss the venire because the prosecution was systematically excluding Hispanics from the panel. Santos also contends the court should have excluded evidence that he had been molested by a priest when he was a child.

Santos argues the court improperly permitted Areana to testify that he allegedly molested her, and Evidence Code section 1108 violates due process. Santos also challenges the instructions regarding section 1108 evidence. Finally, Santos contends the court should have excluded the evidence that he was silent when Detective Martin accused him of molesting Linda, and his silence amounted to a Fifth Amendment claim.

## **DISCUSSION**

### **I.**

#### **THE COURT PROPERLY DENIED SANTOS'S *WHEELER* MOTION**

Santos contends the prosecutor systematically dismissed Hispanics from the jury panel, and the trial court erroneously denied his *Wheeler* motion to discharge the panel and begin jury selection anew. Santos contends the trial court made an implied finding of

a prima facie case of discrimination, and the prosecutor failed to meet his burden to prove race-neutral reasons for the exclusion of at least one of these individuals from the jury.

#### **A. Background**

Santos's *Wheeler* motion was based on the prosecutor's use of peremptory challenges to excuse Miss Casarez, Mr. Angeles, Mr. Carillo, and Miss Burciaga from the panel. We will review the entirety of voir dire and all the challenges exercised by the parties.

During voir dire, Miss Casarez, Mr. Angeles, and Mr. Carillo were part of the first venire. Miss Casarez was a retired teacher. She was a widow, and her husband had been a work contractor. She had previously served on a jury in a criminal case. Mr. Angeles was a high school teacher, and his wife was a teacher's aide. His son-in-law was a sheriff and his friend was a highway patrol officer. Mr. Carillo was a maintenance mechanic for Wal-Mart, and his wife was a social worker for Tulare County. He had never served on a jury. He had friends who were law enforcement officers, lawyers, and judges.

After the challenges for cause, the parties began to exercise their peremptory challenges. The prosecutor used his first peremptory challenge to excuse Miss Casarez. Francisco excused Mr. Floyd, after which the prosecutor excused Miss Shimer. Santos excused Miss Scott, and the prosecutor excused Mr. Hamlin. Francisco then excused Mr. Young, and the prosecutor excused Mr. Angeles.

At this point, additional jurors were called into the box for voir dire and passed for cause. During the next round of peremptory challenges, Santos excused Mr. Conley, and the prosecutor excused Mr. Carillo. Francisco excused Miss Wood, and the prosecutor accepted the panel. Santos excused Miss Roper, and the prosecutor again accepted the panel. Francisco excused Miss Barrios, and the prosecutor accepted the panel. Santos then excused Mr. Strable, and the prosecutor again accepted the panel.

Additional jurors were called into the box for voir dire, and Miss Burciaga was part of this venire. She was employed at the county health department, and worked

closely with CPS on battered women cases. Her husband worked at a dairy. She had previously served on a criminal jury, which had not been able to reach a verdict. Her niece worked with the detective unit and her nephew was a correctional officer. Ms. Burciaga stated that her work experiences would not influence her as a juror. Ms. Burciaga also stated that she spoke with her supervisor, who wanted her to request a hardship excuse because she was scheduled to conduct an HIV training seminar the following week. The court declined to excuse her, and noted the trial would probably not last that long.

The parties again passed the jury for cause and used their peremptory challenges. The prosecutor accepted the panel, and Francisco excused Mr. Fox. The prosecutor again accepted the panel, and Santos excused Miss Higgins. The prosecutor used his next challenge to excuse Miss Burciaga. Santos excused Mr. Kirst, Mr. Hudson, and Mr. Clark, with the prosecutor and Francisco accepting the panel after each challenge.

The court informed the prospective jurors that it would complete jury selection the next morning. After the panel left the courtroom, Mr. Reyes, Santos's counsel, made a *Wheeler* motion based on the prosecutor's use of peremptory challenges to excuse Miss Casarez, Mr. Angeles, Mr. Carillo, and Miss Burciaga. Mr. Reyes stated these individuals all appeared to be Hispanic, and the prosecutor had only excused two non-Hispanic jurors. Mr. Reyes believed the prosecutor used "some bias" in excusing the Hispanics from the panel. Mr. Reyes conceded the panel still included Miss Espino, and a female and male with Spanish surnames and/or who appeared to be Spanish.

The court asked the prosecutor if he "want[ed] to give an explanation for the challenges?" The prosecutor asked if the court was "making a showing?" The court did not respond, and the prosecutor produced his notes and reviewed his challenges.

“[THE PROSECUTOR]: Miss Casarez I will address last. Miss Shimer appears to be non-Hispanic. Mr. Hamlin [was removed] for the reasons stated in chambers.

“THE COURT: I’m not concerned. I just want you to get to this.”

Thereafter, the prosecutor went through his notes to explain the challenges to the four individuals:

“As to Mr. Angeles, I’m sitting closer to the front row prospective jurors. I just heard him making sighs at every delay in the proceedings. He’s been sitting with his arms and legs folded. I just perceived him to have a bad attitude in sort of proceedings delays. [¶] Given we have a child victim and child witness in this case, I perceive there may be some extended breaks, if necessary, for the child to testify. I just saw that his attitude in general towards the proceedings was not positive. That was my reason for excusing him.

“As to Mr. Carillo, he mentioned that he had a background knowledge of [Francisco’s counsel] through his brother, who worked with [Francisco’s counsel]. Out of the abundance of caution, due to any familiarity between defense counsel and a juror, I excused him.

“As to Miss Burciaga, when she was first seated as a potential [juror] in the first row, it’s my opinion she tried every which way to get out of jury service by mentioning she works for county health, that she had upcoming training, changed the days around as to Wednesday or Thursday as to when she had to be there, that it was mandatory. [¶] She’s been on a prior hung jury. My experience has taught me that people on hung juries have a sour outlook on serving on future juries. She also mentioned that her niece worked as a detective. But it turns out she’s an office assistant. There were those inconsistencies. [¶] My perception she was trying very hard to get off of jury service. I don’t know if it’s just this case or in general. But I didn’t see her attitude as being positive as one would pay attention to evidence of a very serious nature.

“As to Miss Casarez, the only notes I have to myself on here I have noted that she was, I believe, one of the first seated in the panel. And I just had an X on her immediately. I don’t know if there was something about her body language. I don’t have anything more specific about her answers. I don’t have an explanation as to her. But I believe she was the first juror that I excused. In my mind I eliminated her right off the bat.”

The court reviewed the prosecutor’s reasons and denied the *Wheeler* motion:

“I don’t find that based upon the explanations given by [the prosecutor] that those challenges were based upon a racial or ethnic



motivation. And I accept his explanations as being legitimate. So the Wheeler motion is denied at this time.”

The court continued jury selection the next day. Another group was called into the box and passed for cause. This new group included at least one Hispanic, Miss Chavez. The prosecutor accepted the panel. Francisco excused Miss Green and Miss Chavez, and Santos excused Miss Davis and Miss Espino. The prosecutor again accepted the panel after each defense challenge.

The final group was called into the jury box for the selection of the remaining jurors and two alternates. The court named Miss Moles and Mr. Vejar as the first two proposed alternates. The prosecutor and Francisco accepted them, but Santos excused Mr. Vejar. The court then named Miss Moles and Miss Munson as the alternates. The prosecutor accepted and Francisco excused Miss Moles. The court named Miss Munson and juror No. 14 as the alternates, and Santos excused Miss Munson. The court finally selected juror Nos. 13 and 14 as the alternates, and the parties accepted them.

## **B. Analysis**

Appellant Santos contends the trial court improperly denied his *Wheeler* motion because the court impliedly found a prima facie case of discriminatory reasons, and the prosecutor failed to meet his burden to explain the challenges to at least one of the Hispanics who were dismissed from the jury panel.

A criminal defendant has a right to trial by a jury drawn from a representative cross-section of the community. A prosecutor may not exercise peremptory challenges to exclude jurors for presumed bias based solely on their membership in a particular racial or ethnic group. (Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; see also U.S. Const., 6th & 14th Amends.; *Batson v. Kentucky* (1986) 476 U.S. 79, 89.) Purposeful discrimination in the selection of the venire violates not only the rights of the prospective jurors, but also those of the criminal defendant who is a member of the same race. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1283.) A defendant need not be of

the same race to object to a prosecutor's race-based exercise of peremptory challenges. (*Powers v. Ohio* (1991) 499 U.S. 400, 415-416; *People v. Hayes, supra*, 21 Cal.4th at pp. 1283-1284.) Hispanics are a cognizable group for *Wheeler* purposes. (*People v. Brown* (1999) 75 Cal.App.4th 916, 924.)<sup>4</sup>

There is a rebuttable presumption that a peremptory challenge has been made on a constitutionally permissible ground. (*People v. Wheeler, supra*, 22 Cal.3d at p. 278; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1124-1125.) To overcome the presumption, the party making a *Wheeler* motion carries the initial burden to establish a prima facie case of group bias. (*People v. Arias* (1996) 13 Cal.4th 92, 134-135.)

A defendant who believes that peremptory challenges are being exercised on the basis of group bias alone must raise the point promptly. (*People v. Hayes, supra*, 21 Cal.4th at p. 1284.) The defendant must then make as complete a record as possible under the circumstances to establish a prima facie case of group bias, showing that the excluded persons are members of a group that is cognizable under the cross-section rule, and that from all of the circumstances a strong likelihood appears that group members are being challenged because of their group association. (*Ibid.*) Only then does the burden shift to the People to provide a race-neutral explanation for the exercise of peremptory challenges. (*Ibid.*; *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154; *People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.)

When the trial court solicits an explanation of the challenged excusals without first indicating its views on the prima facie issue, we may infer an implied prima facie finding.

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<sup>4</sup> We recognize that both the prosecution and the defense are bound by the principles of *Wheeler* and *Batson*. (*Georgia v. McCollum* (1992) 505 U.S. 42, 59; *People v. Wheeler, supra*, 22 Cal.3d at p. 282.) However, we will limit our discussion to the issue presented of whether the prosecution used peremptory challenges to remove Hispanics from the jury.

(*People v. Arias, supra*, 13 Cal.4th at p. 135.) The court cannot undo an implied ruling once made by stating after explanations have been received that it never intended to find a prima facie case. (*Ibid.*) Once an implied prima facie finding has been made, that issue becomes moot, and the only question remaining is whether the individual justifications were adequate. (*Ibid.*)

Thus, once a prima facie case is established, the burden shifts to the other party to show that the peremptory challenges were not based on group bias. (*People v. Motton* (1985) 39 Cal.3d 596, 600; *People v. Williams, supra*, 78 Cal.App.4th at pp. 1124-1125.) The prosecutor's justification need not be sufficient to support a challenge for cause. (*People v. Turner, supra*, 8 Cal.4th at p. 164.) Prospective jurors "may be excused based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias." (*Ibid.*) "[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." (*Purkett v. Elem* (1995) 514 U.S. 765, 769; *People v. Box, supra*, 23 Cal.4th at p. 1186, fn. 6.) Even seemingly "highly speculative" or "trivial" grounds, if genuine and neutral, will suffice. (*People v. Wheeler, supra*, 22 Cal.3d at p. 275; *People v. Arias, supra*, 13 Cal.4th at p. 136; *People v. Williams* (1997) 16 Cal.4th 153, 191; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218.) "What is required are reasonably specific and neutral explanations that are related to the particular case being tried." (*People v. Johnson, supra*, 47 Cal.3d at p. 1218.)

If the trial court finds the prosecution violated the principles of *Wheeler* and *Batson*, the court must quash the entire venire, excuse it, and begin jury selection anew with a new venire. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282; *People v. Smith* (1993) 21 Cal.App.4th 342, 344-346.) The erroneous denial of a defendant's *Wheeler* motion is reversible error per se. (*People v. Wheeler, supra*, 22 Cal.3d at p. 283.)

When the trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200; *People v. Box, supra*, 23 Cal.4th at

p. 1188.) If the record suggests grounds upon which the prosecutor might have reasonably challenged the jurors in question, the reviewing court will affirm the trial court's ruling. (*People v. Turner, supra*, 8 Cal.4th at p. 165; *People v. Box, supra*, 23 Cal.4th at p. 1188.) The trial court's determination that there was no prima facie case of group discrimination will be upheld on appeal if supported by substantial evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 293-294.)

Similarly, we review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "with great restraint." (*People v. Arias, supra*, 13 Cal.4th at p. 136; *People v. Ervin* (2000) 22 Cal.4th 48, 74-75.) If the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Arias, supra*, 13 Cal.4th at p. 136; *People v. Ervin, supra*, 22 Cal.4th at pp. 74-75.) We give great deference to the trial court in distinguishing bona fide reasons from sham excuses. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282; *People v. Turner, supra*, 8 Cal.4th at p. 165.) The determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a "purely factual question." (*People v. Alvarez* (1996) 14 Cal.4th 155, 197; *People v. Ervin, supra*, 22 Cal.4th at p. 75.)

In *People v. Silva* (2001) 25 Cal.4th 345, the California Supreme Court recently addressed the trial court's duty of inquiry in a *Wheeler* motion. Defendant was being retried for the penalty phase of his capital murder case, after the first penalty phase resulted in a hung jury. Twice during jury selection for the retrial, the prosecutor commented that the first penalty trial had hung up on racial grounds. The defense made its first *Wheeler* motion to dismiss the panel after the prosecutor had exercised peremptory challenges against three prospective jurors with Hispanic ancestry or surnames. The court found a prima facie case and asked the prosecutor to explain the reasons for the challenges. The prosecutor gave several reasons, particularly as to

prospective juror Jose M., but *Silva* noted the transcript of the voir dire provided no factual support for the prosecutor's stated explanations. (*Id.* at pp. 376-377.)

*Silva* further noted "the trial court did not ask the prosecutor any questions and did not remark on any discrepancies between the prosecutor's stated reasons and the prospective jurors' responses on voir dire or on their questionnaires. When proceedings resumed in the presence of defendant and defense counsel, the trial court denied the first *Batson/Wheeler* motion. The court said only that the prosecutor 'did provide an explanation with regard to' the three peremptory challenges and that 'I think that there was a good excuse with regard to all of these people.'" (*People v. Silva, supra*, 25 Cal.4th at p. 382.)

A second *Batson/Wheeler* motion was made after the prosecutor challenged two more Hispanic prospective jurors. Again "the trial court did not question the prosecutor or remark on the apparent disparity between the prosecutor's stated reasons and what the record shows to have occurred during voir dire." The court informed defense counsel that the reasons given by the prosecutor "'appear to very valid reasons for those excuses.'" (*People v. Silva, supra*, 25 Cal.4th at p. 383.)

At the motion for new trial, defendant claimed that almost all of the prosecutor's reasons for excluding the challenged Hispanic prospective jurors were either unsupported by the record or inherently implausible. Without commenting on the reasons, the trial court reiterated that it found the reasons sufficient. (*People v. Silva, supra*, 25 Cal.4th at p. 384.) Defendant appealed and challenged the validity of the denial of his *Batson/Wheeler* motion at the penalty phase of his trial.

In *Silva*, the Supreme Court reaffirmed that the exclusion of a single juror by peremptory challenge on the basis of race or ethnicity is an error of constitutional magnitude requiring reversal. (*People v. Silva, supra*, 25 Cal.4th at p. 386.) The court reviewed all of the challenges and found numerous discrepancies between the prosecutor's reasons and the responses of the challenged jurors in the record. The

Supreme Court then focused on prospective juror Jose M., and found the trial court erred in its review of the reasons given to support the prosecutor's challenge:

“[W]e agree with defendant that the court erred in denying the motion as to Prospective Juror Jose M. Nothing in the transcript of voir dire supports the prosecutor's assertions that M. would be reluctant to return a death verdict or that he was ‘an extremely aggressive person.’ Although an isolated mistake or misstatement that the trial court recognizes as such is generally insufficient to demonstrate discriminatory intent [citation], it is another matter altogether when, as here, the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge and the trial court has failed to probe the issue [citations]. We find nothing in the trial court's remarks indicating it was aware of, or attached any significance to, the obvious gap between the prosecutor's claimed reasons for exercising a peremptory challenge against M. and the facts as disclosed by the transcripts of M.'s voir dire responses. On this record, we are unable to conclude that the trial court met its obligations to make ‘a sincere and reasoned attempt to evaluate the prosecutor's explanation’ [citation] and to clearly express its findings [citation].” (*People v. Silva, supra*, 25 Cal.4th at p. 385.)

*Silva* concluded that “the trial court's ultimate determination--that defendant failed to meet his burden of proving intentional discrimination with respect to the prosecutor's peremptory challenge of Prospective Juror M.--is unreasonable in light of the evidence of the voir dire proceedings. Although we generally ‘accord great deference to the trial court's ruling that a particular reason is genuine,’ we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. [Citations.] When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient. As to Prospective Juror M., both of the prosecutor's stated reasons were factually unsupported by the record. Because the trial court's ultimate finding is unsupported--at least as to Prospective Juror M.--we conclude

that defendant was denied the right to a fair penalty trial in violation of the equal protection clause of the federal Constitution [citation] and was denied his right under the state Constitution to a trial by a jury drawn from a representative cross-section of the community [citation].” (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386.)

In the instant case, the record suggests the trial court made an implied *prima facie* finding of discrimination, based on the exchange which ensued when the court asked the prosecutor to explain the reasons for dismissing the individuals from the jury panel. However, there is substantial evidence to support the court’s finding of nondiscriminatory reasons for the prosecutor’s challenges to the Hispanics on the jury panel. The prosecutor gave very specific, race-neutral reasons for the use of his peremptory challenges as to Mr. Angeles, Mr. Carillo, and Miss Burciaga. He was clearly relying on his notes which he compiled during *voir dire*, and his specific justifications were not pretextual reasons to provide an after-the-fact rationale for his use of peremptory challenges. The prosecutor was concerned that Mr. Angeles and Miss Burciaga were impatient with the jury selection process and were eager to get themselves excused from the panel. The prosecutor’s concerns were based on the realistic premise that these individuals would not have the patience to consider the testimony of a child victim who was hesitant and embarrassed to testify about sexual molestations inflicted upon her by her father and uncle. The prosecutor also explained his concern about Mr. Carillo’s familiarity with Francisco’s defense counsel. We note that at the hearing on the *Wheeler* motion, appellant did not attack these reasons and implicitly accepted the veracity of the prosecutor’s statements about the individuals’ responses to *voir dire*.

On appeal, Santos also seems to concede the prosecutor’s reasons were valid for Mr. Angeles, Mr. Carillo, and Miss Burciaga, but asserts there is no substantial evidence to support his excuse to remove Miss Casarez because “the prosecutor provided no reason whatsoever for challenging her.” Santos claims the prosecutor’s reasons for removing Miss Casarez suggests that she “was excused precisely because of racial

stereotypes, for it is not easy to see how else she could have been eliminated ‘[i]n my mind’ ‘right off the bat’ even before she had provided any answers to voir dire.”

As discussed above, a prospective juror may be excluded based on hunches, arbitrary reasons, highly speculative, or even trivial grounds, if genuine and neutral, so long as the reasons are not based on impermissible group bias. (*People v. Turner, supra*, 8 Cal.4th at p. 165.) “[A] ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.” (*Purkett v. Elem, supra*, 514 U.S. at p. 769; *People v. Box, supra*, 23 Cal.4th at p. 1186, fn. 6.) The prosecutor commented that he immediately eliminated Miss Casarez from the panel, but he did not know if it was “something about her body language. I don’t have anything more specific about her answers. I don’t have an explanation as to her. But I believe she was the first juror that I excused. In my mind I eliminated her right off the bat.” Contrary to Santos’s arguments, the prosecutor’s reasons for excusing Miss Casarez are not reflective of a challenge based on an impermissible group basis that is violative of equal protection, but exactly the type of hunch or arbitrary basis that has been found to be constitutional. The trial court found the prosecutor’s reasons to be legitimate, and we give great deference to the trial court to distinguish bona fide reasons from sham excuses. (*People v. Wheeler, supra*, 22 Cal.3d at p. 282; *People v. Turner, supra*, 8 Cal.4th at p. 165.)

In addition, there is no indication that Hispanics were completely excluded from the instant jury. The prosecutor’s reasons were supported by the record, and were not contrived or inherently implausible. The trial court was not required to make additional inquiries into the prosecutor’s reasons, even as to Miss Casarez, given the prosecutor’s admission that he was essentially relying on a hunch when he decided to excuse her from the panel.

In light of the entirety of the record, we cannot say that the prosecutor’s inability to state one specific reason as to Miss Casarez amounted to a violation of equal protection. In addition, the trial judge saw and heard the entire voir dire proceedings and



found the prosecutor made no improper use of peremptory challenges. (*People v. Ervin, supra*, 22 Cal.4th at p. 77.) “Under these circumstances we see no good reason to second-guess his factual determination.” (*People v. Johnson, supra*, 47 Cal.3d. at p. 1221.) The trial court properly denied Santos’s *Wheeler* motion.

## II.

### **THE COURT PROPERLY DENIED FRANCISCO’S MOTION TO STRIKE LINDA’S TESTIMONY**

Francisco contends his conviction in count I is not based on admissible, substantial evidence. Francisco’s argument is based on the trial court’s denial of his motion to strike Linda’s testimony. Francisco contends that Linda admitted she lacked any independent recollection of Francisco’s alleged molestation, and all her accusations were based on information given to Linda by her sister, Rosalina. Francisco argues the court’s denial of his motion to strike resulted in a violation of his right to due process because Linda’s testimony was inadmissible and based on hearsay.

#### **A. Background**

As set forth above, Linda extensively testified regarding the acts of Francisco and Santos. On direct examination, Linda testified she told her sister, Rosalina, about the incidents when she was younger. On cross-examination, Linda testified that she couldn’t remember telling Rosalina about the incidents, but Rosalina later told her they had talked about the incidents when they were younger.

On further cross-examination, Francisco’s attorney again asked Linda if she remembered telling Rosalina about the incidents when she was younger:

“Q. Linda, do you remember . . . I asked you when [Rosalina] told you those things you had told her, you told me that you didn’t remember ever telling her these. Do you remember that?

“A. Yes.

“Q. Now, do you remember her telling you those things or do you not?

“A. No.

“Q. You don’t?

“A. No.

“Q. So you don’t remember ever telling Rosalinda [*sic*] anything about [Francisco]; isn’t that right?

“A. Yes.

“Q. And the only thing you’re telling us about [Francisco] is what Rosalinda [*sic*] told you; is that correct?

“A. Yes.”

On redirect examination, the prosecutor tried to clarify Linda’s testimony about Francisco:

“Q. I want to make sure we’re not confusing you. I’m not sure what you’re saying. When you’re telling us yesterday and today about stuff that [Francisco] did, is that stuff you remember in your own head?

“A. Yes.”

Francisco’s attorney again sought to undermine her testimony on recross-examination:

“Q. I asked you, and you said you remembered some things about [Francisco] did and you told me no you don’t remember anything. Now the District Attorney asked you and you said you do. Now, do you remember anything [Francisco] did to you or do you not remember?

“A. I do.

“Q. What do you remember?

“THE COURT: Linda, do you understand the question?

“THE WITNESS: No.

“Q. We’ve asked you before if you remember anything that [Francisco] did to you and you said -- you previously said no. Now I just asked you that question again and I asked you do you remember what

[Francisco] did to you, anything he did to you, and you said yes. Now I'm asking you what is it that you remember that he did, if you remember.

“A. I don't remember.

“Q. You don't remember? [¶] No further questions.”

Linda was then excused from the stand.

Immediately after Linda completed her testimony, Francisco's attorney moved to strike all of Linda's testimony because it was “all based on hearsay from a third party. It is not from her own recollection, according to her own testimony.” Santos's attorney joined in the motion. The court denied the motion to strike and found “sufficient testimony in the record from her that what she's testified to is from her own recollection. I know there's some contradictory evidence in the record otherwise. But that's for the jury to determine.”

Francisco's attorney argued that Linda admitted she only remember what Rosalina told her, and she did not remember anything herself. The court noted that Linda testified that she did remember things that Francisco did, and the court did not know if Linda's subsequent answers were the result of her reluctance to discuss the touching incidents. “And I think that's the province of the jury. That's the fact finding process for the jury to determine and not for me. [¶] I think there is sufficient evidence based upon her direct examination that she in fact was testifying to her own recollection as to what happened.”

The court subsequently denied Francisco's motion to dismiss count I for insufficient evidence. The court found sufficient evidence that Linda's testimony was based on her own recollection rather than the product of being told by someone else, and the jury could properly evaluate her testimony.

## **B. Analysis**

In assessing the sufficiency of the evidence to sustain a criminal conviction, the reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Earp* (1999) 20 Cal.4th 826, 887.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on “isolated bits of evidence.” (*People v. Johnson, supra*, 26 Cal.3d at p. 577; *People v. Cuevas* (1995) 12 Cal.4th 252, 261.)

An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) It must not reweigh the evidence, reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 884.) Furthermore, an appellate court may reject the testimony of a witness who was apparently believed by the trier of fact only if that testimony is inherently improbable or impossible of belief. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 21; *People v. Maxwell* (1979) 94 Cal.App.3d 562, 577.) An appellate court may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Francisco contends the trial court should have granted his motion to strike all of Linda’s testimony, based on her responses in the course of the cross-examination, as set forth above. Francisco’s argument ignores the entirety of Linda’s testimony, in which she set forth, in great detail, the incidents of molestation committed by Francisco. While Linda was shy and rather embarrassed to discuss the details, she never wavered in her description of Francisco’s conduct. Francisco insists that Linda effectively repudiated her prior testimony when she admitted, during cross-examination, that she could not remember the incidents. The entirety of the record, however, reveals that she became confused as counsel rapidly switched the nature of the questions between whether she

could remember discussing Francisco's conduct with her sister, or whether she remembered the molestations at all.

Inconsistencies and contradictions during the course of thorough cross-examination of a child witness go to the weight and credibility of the child's testimony, and not to the alleged insufficiency of the evidence. (*People v. Gil* (1992) 3 Cal.App.4th 653, 659.) The jury obviously believed Linda's testimony, and this court can reject her testimony only if there is either a physical impossibility that her testimony is true or that its falsity is apparent without resorting to inferences or deductions. (*People v. Gayther* (1980) 110 Cal.App.3d 79, 87; *People v. Thornton* (1974) 11 Cal.3d 738, 754.) Neither situation is present in this case. The trial court properly denied Francisco's motion to strike Linda's testimony, and there is substantial evidence to support his conviction for the continuous sexual abuse of Linda.

### III.

#### **FRANCISCO'S PREARREST STATEMENT**

Francisco contends the trial court improperly denied his motion to exclude his prearrest statement to Detective Martin. Francisco argues his statement was involuntary and induced through Detective Martin's use of threats, promises and coercion.

##### **A. Background**

During the pretrial motions, Francisco moved to exclude his prearrest statement to Detective Martin pursuant to Evidence Code section 402. Francisco asserted that Detective Martin conducted the majority of the interview prior to turning on the tape recorder. During this portion of the interview, Martin allegedly made various threats and promises to induce Francisco to give a false confession. Francisco claimed that after he agreed to give the false confession, Detective Martin turned on the tape recorder and Francisco merely stated information which Martin had shared with him from the police reports.

At the section 402 hearing, Francisco testified that he had a “really nice” conversation with Detective Martin during the initial portion of the interview, as they talked about sports and their families. Francisco acknowledged that Martin said he was free to leave and he did not have to answer any questions, but Francisco stayed to talk with him. Martin informed Francisco that Linda had filed a report that he had touched her inappropriately. Francisco testified that he denied it a couple of times, but Martin said to stop “fooling around” because they both knew that Francisco did it. Francisco testified he became a little bit upset because Martin was being aggressive toward him. However, Francisco did not leave because his conscience was clear and he didn’t have anything to hide.

Francisco testified that Martin talked about statements made by Linda’s mother, that she believed Santos had molested Francisco. Francisco denied it, and Martin said that he knew Francisco had been molested, and asked who did it. In addition, Martin also said that he had been molested as a child. Francisco testified that subject “was something that I wanted to [keep] for myself until I die. But for some reason or the other, I trusted [Martin] and told him.” Francisco testified that he told Martin he had been molested by a priest when he was a child. Francisco had never trusted anyone else with this secret, but he “found a friend” in Martin because he was “somebody that I could trust.”

Francisco testified that after he told Martin about the priest, Martin asked if he was a believer and loved his mother. Francisco replied that he did. Martin said that Francisco could go to prison if he did not say anything about Linda’s allegations because “then the jury would believe that I was a sick man, and so [would] the judge” because he kept quiet. However, Martin said that if Francisco cooperated with him, he would talk to the judge and get him, “at the most a weekend in jail.” Martin also promised to try and get community service for Francisco.

Francisco testified that it sounded like a “good deal” to him because he would rather spend a weekend in jail than many years in prison. Francisco became convinced

that if he did not talk, he would go to prison, but he would get a lighter sentence if he cooperated with Martin. Francisco testified he decided to talk to Martin because of the good deal, but he still insisted that he never touched Linda. Francisco testified that Martin produced the police report which contained Linda's statement, and went over the report with Francisco so he would know what to say about the alleged touchings. Martin told Francisco that he believed Linda, and told Francisco "[s]upposedly what I have done when I did it, where I did it, and how I done it."

Francisco testified that after Martin reviewed the police report with him, Martin turned on the tape recorder and restarted the interview. Martin asked Francisco about improperly touching Linda, and Francisco testified that he again denied it: "I wasn't convinced yet. I mean I knew that I hadn't done it, but still I saw myself a window to get out of a mess that I don't know to me was just so confused. We went on with the interview. But I guess, I mean, I wasn't doing good enough for him."

Francisco repeatedly denied touching Linda, and Martin finally turned off the tape recorder. Francisco testified that Martin again went over the police report with him, and asked if he was a great believer. "[Martin] brought up my mother and asked me if I loved her. Do you know if you go to prison she's gonna *[sic]* to suffer a lot? I'm like yeah, of course, she's gonna *[sic]* suffer. I'm her youngest son. I'm gonna *[sic]* be in prison? Yes, she's gonna *[sic]* suffer. ¶] So then we went over the report and we started with the interview."

Francisco testified that Martin restarted the tape recorder and they continued the interview. This time, Francisco admitted that he touched Linda, even though he knew it was not true. Francisco testified that he admitted the touchings because Martin promised that he would only get a weekend in jail or community service.

Francisco testified that at the end of the interview, Martin turned off the tape recorder and said he was glad Francisco "'came out with it.' And he asked me to keep in touch with him, to call him . . . so that when the Court would issue the warrant of my

arrest, just to come in and turn in myself so that way my mother wouldn't know that I was arrested, and just spend the weekend and that way she would never find out."

On cross-examination, Francisco admitted that he told Martin the story about the priest during the tape-recorded portion of the interview, and this story was truthful. He felt he could trust Martin with his secret. Francisco also admitted that he knew he could have left the interview at any time, but he lied about touching Linda so he could get the deal offered by Martin. Francisco conceded that at the end of the tape-recorded portion, Martin asked if anyone had promised him anything, and Francisco stated that he had not been promised anything. However, Francisco testified that this statement was a lie because Martin had promised to help him if he admitted he touched Linda. Francisco also conceded that the tape recording reflected he told Martin he would apologize to Linda. However, Francisco again testified that he was admitting to something that he hadn't done.

Detective Martin also testified at the section 402 hearing about his interview with Francisco. Martin testified the entire interview lasted 90 minutes. The first part of the interview was for one hour, and he did not activate the tape recorder during this portion. He informed Francisco the interview was about the inappropriate touching of Linda, and Francisco denied touching her.

Detective Martin testified he never talked with Francisco about his mother, never asked if he loved his mother, and never said it would hurt his mother if he went to prison. Instead, Francisco mentioned his mother when he discussed the circumstances of when he was molested by the priest in Mexico. Francisco stated he could not tell his mother and family about the incident because they would not believe it about the priest. Martin testified that he never showed any police reports to Francisco, or reviewed the scope of Linda's statements with him. Martin testified he never made any promises to Francisco, that he would speak with the judge, or that he would only serve a weekend in jail or



received community service if he confessed. Martin never told Francisco that he would go easy on him if he confessed.

Martin testified that during the first portion of the interview, Francisco denied one time that he touched Linda. Martin tried to build a rapport with Francisco, and asked if anything happened in the past. Martin also told Francisco that he had been molested by a teacher when he was a child. Martin made this statement in an effort to get Francisco to open up. Francisco then talked about being molested by a priest when he was a child.

Martin testified that when Francisco confessed that he touched Linda, Martin told him that “part of getting help is saying what you did,” and that “people who touch children inappropriately do need help.” However, Martin never promised to get help for Francisco if he confessed.

After they had discussed the entire incident, Martin asked Francisco if they could go over it again with the tape recorder on. Francisco said it was okay, and Martin turned on the machine and they went over the facts again. Martin testified that when he turned on the tape recorder for the latter portion of the interview, he left it on for the remainder of their conversation and never turned it off and on again. Martin testified that he never shut off the tape recorder and went over the police report with Francisco.

At the conclusion of the section 402 hearing, Francisco’s counsel argued the tape-recorded interview revealed there was more to Francisco’s conversation with Martin than the recording actually reflected, and Francisco’s testimony was credible. The prosecutor asserted the tape recording reflected that Francisco voluntarily admitted that he touched Linda, and discounted Francisco’s claims of promises and coercion.

The trial court denied Francisco’s motion to exclude his prearrest statement. The court had listened to the tape-recorded interview and reviewed the transcript, and found that Francisco’s statements were not coerced, involuntary or the product of any promises. The court also found the statement was not obtained in violation of *Miranda*. The court also ruled that while Francisco could not argue the alleged involuntariness of the

interview to the jury, he could testify about his version of the interview to undermine Detective Martin's credibility.

**B. Analysis**

On appeal, Francisco does not raise any *Miranda* issues, but instead contends the court should have found his prearrest statements were involuntary and his motion to exclude should have been granted. Francisco asserts that his testimony at the section 402 hearing established the statement was the result of Detective Martin's threats, promises, and coercion which occurred prior to the tape-recorded portion of the interview. Francisco contends that despite his testimony of such threats and promises, "the court [nevertheless] allowed such evidence to be considered by the jury."

Under the due process clauses of the state and federal Constitutions, a defendant's admission or confession, which he challenges as involuntary, may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v. Williams* (1997) 16 Cal.4th 635, 659; *People v. Markham* (1989) 49 Cal.3d 63, 71.) A statement is involuntary and, thus, inadmissible, if it is obtained by threats or promises of leniency, whether express or implied, however slight, or by the exertion of any improper influence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; *People v. Clark* (1993) 5 Cal.4th 950, 988; *People v. Benson* (1990) 52 Cal.3d 754, 778.) "[A]ny promise made by an officer . . ., express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession . . . ." (*People v. Ray* (1996) 13 Cal.4th 313, 339; *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1091.)

On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. (*People v. Williams, supra*, 16 Cal.4th at p. 659; *People v. Benson, supra*, 52 Cal.3d at p. 779.) Any factual findings by the trial court as to the circumstances surrounding an admission or confession, including the characteristics of the accused and the details of the interrogation, are subject to review under the deferential

substantial evidence standard. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Williams*, *supra*, 16 Cal.4th at p. 660; *People v. Benson*, *supra*, 52 Cal.3d at p. 779.)

Francisco contends the trial court should have excluded his prearrest statement as involuntary. Francisco's argument is based on his own testimony at the section 402 hearing as to his conversation with Detective Martin prior to the tape-recorded portion of the interview. Francisco claimed that Detective Martin induced his confession by promises of leniency if he would cooperate, and Francisco merely repeated information which Martin shared with him from the police report. Francisco's testimony was directly contradicted by Detective Martin's account of the interview. Martin denied that he made any threats to Francisco, or that he coerced the confession by promises of leniency if he would cooperate. Martin denied that he showed the police reports to Francisco, or that he told him just to repeat the contents of Linda's statements. Martin testified that he never made any promises to Francisco, either before or after he turned on the tape recorder.

Francisco's theory of involuntariness raised questions of fact for the trial court to determine the credibility of the witnesses. The trial court denied Francisco's motion to exclude, and impliedly found Detective Martin's testimony was more credible than Francisco's account of the interview. The court's implied finding is supported by substantial evidence, and is not inherently implausible in light of the entirety of the record. We thus conclude the trial court's implied factual findings are supported by the record, and the court properly found Francisco's statement was not involuntary or induced by threats and promises.

#### IV.

#### **THE PRIEST'S MOLESTATION OF SANTOS**

Santos next contends the trial court improperly allowed the prosecution to introduce evidence that both Santos and Francisco were molested by a priest when they were children. Santos asserts such evidence was not relevant to the charges in this case,

and the erroneous admission of the evidence was prejudicial because it amounted to improperly propensity evidence.

#### **A. Background**

As set forth above, Francisco made a pretrial motion to exclude his prearrest statement to Detective Martin. During the section 402 hearing, Detective Martin and Francisco both testified that Francisco said he was molested by a priest when he was a child.

At the section 402 hearing, the prosecution played the tape recording of Martin's interview with Francisco, in which Martin also mentions they had discussed something which happened to Francisco involving the priest. Francisco stated the priest repeatedly forced him to perform acts of oral copulation, and he was afraid to tell anyone about the molestations. Martin asked Francisco if he thought the priest's conduct had anything to do with "what you did to Linda," and Francisco replied that he did not know because he never talked about the priest with anyone.

The court denied Francisco's motion to exclude his prearrest statement, and found no evidence that his statement was coerced by threats or promises. Francisco asked whether he could testify before the jury about his account of the interrogation, and attack Detective Martin's credibility as to his version of the interview. The court replied it had already ruled on the legal issue of voluntariness, but Francisco could argue to the jury that words "may have been put into his mouth or he was asked leading questions or that sort of thing," and those were issues for the jury.

Santos then noted that in Martin's tape-recorded interview with Francisco, they discussed that Francisco was molested by a priest. Santos did not think there was anything in the tape recording that indicated that he had also been molested by the priest. "As a precaution, I want to make sure that that is not discussed when [Francisco's] statement is brought in, because it does make reference to [Santos] at least I believe by implication."

The court instructed the prosecutor, “[T]hat should not come in.” The prosecutor replied he would caution Detective Martin. Francisco’s counsel indicated that most of the conversation about the priest occurred before the tape recorder was turned on, and Detective Martin also indicated that he asked Francisco if he was molested by Santos. The court agreed the witnesses would be admonished, and continued with other pretrial matters.

During trial, Detective Martin testified regarding the first portion of his interview with Francisco, which occurred prior to turning on the tape recorder. Francisco initially denied that he touched Linda. Martin asked whether something happened to him in the past, in order to give him a reason to justify what he did. Francisco replied “that when he was a child living in Mexico, he was molested by the priest in his village.” Francisco explained that he was seven years old, and the priest would take him into a secluded area and have him perform acts of oral copulation.

“They lived close to the church. Him and his mother would go to church constantly or all the time, and that the priest was [F]ather George. They would clean the church and go there to pray. Father George would take him away so nobody would see and have him touch him and have him orally copulate him.”

Detective Martin replied that it was terrible, but he did not promise to obtain help for Francisco to induce him to confess. Neither defense counsel objected to this testimony.

Detective Martin also testified about his interview with Santos. He twice confronted Santos with Linda’s allegations, but Santos did not make any response.

“Q. What happened next in your conversation with him?

“A. I think I went into the foundation for -- let me say this correctly. I went into something that happened to him a long time ago in Mexico as I had learned from his brother Francisco. I had assumed that he was also molested by the same priest.

“Q. Did you ask him about that specifically?

“A. Yes.

“[SANTOS’S COUNSEL]: *Objection, relevancy.*”

“THE COURT: Overruled.

“[THE PROSECUTOR]: What did he say in response?

“A. That he was.” (*Italics added.*)

Detective Martin further testified that Santos did not give any details about what the priest did to him, and Martin returned to the questions of Linda’s allegations.

On cross-examination, Santos’s attorney questioned Detective Martin about the priest incident:

“Q. You then at some point discussed with him the possibility of some incidents regarding him possibly being molested when he was younger. Would that be correct?

“A. Yes.

“Q. And you mentioned something about you also thought maybe he was a victim of a priest?

“A. Yes.

“Q. And now referring to page three [of your report], Santos appeared to be upset about telling you that he was molested as a nine-year-old child. Would that be correct?

“A. Correct.

“Q. So he was upset, apparently, about him being molested or whatever?

“A. I think he was upset about divulging.

“Q. He was hurt, upset, traumatized, whatever?

“A. Yes.”

When Francisco testified at trial, he also referred to his conversation with Detective Martin about the priest. Francisco testified that he always went to church with his mother when they lived in Mexico: “Since I was the youngest one, I was always with

my mother. That is when I remember what had happened to me. . . .” Francisco testified that Martin also discussed the impact of the priest’s conduct on his actions against Linda:

“Q. And did he say anything to you about transferring this thing to Linda?

“A. He told me that usually there was somebody molest somebody, that’s because somebody else did it -- I mean have done it and pass to that individual. And he believed that what I was doing it had to do with what had happened to me [by the priest].”

In his closing argument, the prosecutor addressed Francisco’s claim that he lied in his tape-recorded confession as a result of Martin’s promises of leniency. The prosecutor urged the jury to listen to the tape recording, and that it disputed Francisco’s claim that his confession was scripted and rehearsed.

“On the tape there’s a tone of voice that shows defeat, relief, maybe some trust. Detective Ralph Martin did his job investigating a crime where normally a child’s voice goes unheard, stands alone. He used his skills, got underneath Francisco [C.]’s skin, and found the reason why he did it. That’s how he started his interview. We know what happened. We just want to know why. [¶]...[¶]

“At least a couple different times in his statement [Francisco] said he knew that it was wrong. He went ahead and did it anyway. Detective Martin plants the seed, gives him a reason why he can feel okay about himself, a reason why he doesn’t have to say oh, gosh, I must be sick, because we know he is. But a reason why he can now say I did it but hear’s [sic] why. This is my background. This is what caused me to do it.”

At the time that Detective Martin testified about Francisco’s statements, the court instructed the jury that such evidence could only be considered against Francisco and not against Santos. The court gave a similar admonition when Detective Martin testified about Santos’s statements. The court also instructed the jury pursuant to CALJIC No. 2.08, that evidence of a statement made by a defendant could only be considered against that defendant, and not against the other defendant.

## **B. Analysis**

Santos contends the court improperly allowed Detective Martin to testify about his statements that he was molested by the priest when he was a child. Santos argues this evidence was prejudicial and irrelevant to the allegations made by Linda, and the prejudicial impact was increased in conjunction with the evidence of Francisco's statements about the priest. Santos concedes the jury was instructed to consider their statements separately, but asserts the jury was also subject to the prejudicial impact of Detective Martin's testimony about his conversation with Francisco and his opinion that Francisco's conduct was the result of the molestation by the priest, and the prosecutor's discussion of this evidence in closing argument.

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d); *People v. Crittenden, supra*, 9 Cal.4th at p. 132.) "'Relevant evidence' means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891; *People v. Freeman* (1994) 8 Cal.4th 450, 491.) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 132.)

The exclusion of relevant but prejudicial evidence is governed by Evidence Code section 352, which provides that the court may in its discretion exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a)



necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352; *People v. Farmer* (1989) 47 Cal.3d 888, 906.)

However, a defendant’s objection on relevancy grounds does not preserve an objection on any other ground, including the alleged prejudicial nature of the evidence under section 352. (Evid. Code, § 353; *People v. Visciotti* (1992) 2 Cal.4th 1, 51-52.) The lack of a specific objection on a ground later urged on appeal precludes consideration of the defendant’s claim that the evidence was improperly admitted. (*People v. Price* (1991) 1 Cal.4th 324, 440.)

A trial court’s decision to admit evidence as relevant may be reversed only for a manifest abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Gordon* (1990) 50 Cal.3d 1223, 1239.) Such an abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Jones* (1998) 17 Cal.4th 279, 304.)

Even if the trial court abuses its discretion through the admission of irrelevant evidence, the defendant’s conviction may only be reversed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, i.e., it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035; *People v. Scheid* (1997) 16 Cal.4th 1, 21; *People v. Wright* (1985) 39 Cal.3d 576, 586.)

In the instant case, the trial evidence regarding the priest’s molestation of Francisco and Santos was raised through the testimony of Detective Martin, and his account of his interviews with the brothers. The evidence was first presented when Detective Martin testified about his interview with Francisco, and that he asked Francisco if there was any reason that Linda might have been molested. Francisco replied that he

was sexually molested by a priest when he was a child. Detective Martin again testified about the incident in relation to the tape-recorded portion of Francisco's interview. On the tape which was played for the jury, Francisco frankly discussed the nature and circumstances of the priest's conduct, and his reluctance to tell his mother about the repeated molestations. Francisco also addressed this issue when he testified at trial, and testified that he was molested by the priest when he was a child.

Detective Martin also testified about his prearrest interview with Santos, and that he asked Santos if he also had been molested by the priest. Martin testified that Santos seemed upset he knew about the incident, confirmed that he was molested, but declined to give any details.

Francisco did not object to any evidence that he was molested by the priest. Indeed, Francisco's trial defense was partially based on his decision to confide in Martin about the priest incident. While the court held that Francisco's statement was voluntary, it permitted Francisco to testify before the jury that he lied in his tape-recorded statement, and he merely repeated the information which Detective Martin showed him in the police reports. Francisco claimed that Martin expressed sympathy and understanding when he confided in him about the priest, and Francisco's purported confession was induced by Martin's alleged promises to obtain help for Francisco because of the impact of the priest's abuse. The evidence about Francisco's molestation by the priest was relevant for the jury to evaluate the credibility of both Martin and Francisco, and to either rebut or support Francisco's claim that his confession was a sham. Thus, the entirety of Martin's conversation with Francisco was relevant to set forth the circumstances of his conversation with Martin, and to assess the credibility of his claim that Martin coerced him into admitting he molested Linda.

Santos did not object to any evidence about the priest's molestation of Francisco. However, Santos lodged two objections regarding the evidence of his own molestation by the priest. At the conclusion of the section 402 hearing, Santos requested the court to

instruct Detective Martin to refrain from testifying about his preliminary comments to Francisco, as to whether he had been molested by Santos. The court granted Santos's request, and Detective Martin limited his testimony accordingly.

At trial, Santos did not object when Detective Martin testified that he assumed Santos had been molested by the same priest as Francisco. Santos lodged his only trial objection when the prosecutor asked Detective Martin if he specifically asked Santos about the priest, and he limited his objection to relevancy. The court overruled the objection, and Detective Martin simply testified that Santos said he was molested but he did not give any details.

On appeal, Santos contends this evidence was not relevant and asserts the erroneous admission of this evidence was prejudicial because it amounted to a type of propensity evidence. In support of these claims, Santos cites the testimony regarding Francisco, and the prosecutor's closing argument comments which referred to Francisco and the priest incident. However, Santos never lodged any objections based on the alleged prejudicial nature of this evidence or that it amounted to propensity evidence. Santos also failed to object to any aspect of the prosecutor's closing argument.

We are thus presented with the question as to whether Detective Martin's testimony as to Santos's comments about the priest was relevant evidence, or whether the court abused its discretion and admitted irrelevant evidence.

While the evidence as to Francisco was clearly relevant, the relevancy of the priest incident as to Santos is more problematic. The story that Santos was molested by a priest when he was a child was obviously peripheral to the charged offenses. There was nothing to connect this evidence to any disputed issue in the case, or to Santos's relationship with Linda. This evidence did not tend to establish any fact that was material for the prosecution, or to overcome any material matter sought to be proved by the defense. Santos did not raise the same voluntariness challenge to his prearrest statement as Francisco, and the story about the priest was not necessary for the jury to evaluate the

credibility of either Santos or Martin about their competing accounts of the interview. There is really no conceivable theory under which this evidence was relevant to the prosecution's case against Santos, and the court abused its discretion in denying Santos's relevancy objection. The court should have prevented the prosecution from asking Detective Martin any additional questions about Santos and the priest incident.

In assessing the impact of the erroneous admission of this evidence, we must determine whether it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. Appellant asserts the error was prejudicial based on the separate testimony regarding Francisco and the priest, and the prosecution's closing argument. However, Santos never objected to the testimony as to Francisco, and never objected to the prosecutor's closing argument. In addition, the jury was instructed pursuant to CALJIC No. 2.08, that evidence of a statement made by a defendant could only be considered against that defendant, and not against the other defendant.

It cannot be said that a more favorable result would have occurred if this evidence had been excluded. Linda's testimony against Santos was compelling and plausible. She described specific incidents surrounding the circumstances of Santos's sexual molestation. She described, in great detail, the incident which occurred when Santos had a fight with his girlfriend, and they spent the night at a friend's house. She recalled that she slept in the bedroom used by the friend's daughters, she used the lower half of the bunk bed, and the blankets and sheets were pink. She clearly testified that she woke up in the middle of the night, and discovered Santos had climbed into her bed. She also clearly described Santos's sexual conduct against her. As discussed in part II, *supra*, Linda's hesitancy and embarrassment in testifying about these events did not render her testimony inherently unbelievable or subject to a motion to strike. We thus conclude that based on the entirety of the record, particularly Linda's compelling testimony, it is not reasonably probable that a result more favorable to Santos would have occurred if the

court had excluded the evidence that Santos was molested by a priest when he was a child.

## V.

### **EVIDENCE CODE SECTION 1108**

As set forth in the factual statement, the trial court granted the prosecution's motion to introduce Areana's testimony as evidence of Santos's prior uncharged acts of molestation. The court's ruling was based on Evidence Code section 1108. Santos contends that section is unconstitutional because it permits the introduction of uncharged acts to prove the defendant's alleged propensity to commit sexual molestations.

Under Evidence Code section 1108, evidence of a prior sexual offense is admissible in a prosecution for another sexual offense to prove defendant's propensity to commit such crimes. Section 1108 states:

“In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

Accordingly, when a defendant is charged with a sexual offense, evidence of the defendant's uncharged sexual misconduct is no longer subject to the general prohibition against character evidence. (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.)

While section 1108 has removed the blanket restrictions of Evidence Code section 1101 excluding propensity evidence, the trial court still retains discretion pursuant to Evidence Code section 352 to exclude such propensity evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues, or mislead the jury. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183; *People v. Soto, supra*, 64 Cal.App.4th at pp. 983-986.)

In *People v. Falsetta* (1999) 21 Cal.4th 903, the California Supreme Court rejected a due process attack on section 1108, similar to the one advanced by appellant. As to

appellant's equal protection attack on section 1108, we note that while *Falsetta* did not specifically address this issue, therein the California Supreme Court noted *Fitch* "rejected the defendant's equal protection challenge, concluding that the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests. [Citation.] As *Fitch* stated, 'The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]' [Citations.]" (*People v. Falsetta, supra*, 21 Cal.4th at p. 918, citing *People v. Fitch, supra*, 55 Cal.4th at pp. 184-185.)

For the reasons best expressed in *Fitch*, which were endorsed in *Falsetta*, we similarly reject appellant's equal protection attack on section 1108. (See also *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Frazier* (2001) 89 Cal.App.4th 30, 40; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 140; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405-406; *People v. Callahan* (1999) 74 Cal.App.4th 356; *People v. Harris* (1998) 60 Cal.App.4th 727; *People v. Soto, supra*, 64 Cal.App.4th at pp. 986-990.)

## VI.

### **ADMISSION OF AREANA'S TESTIMONY**

Santos next contends the trial court improperly allowed Areana to testify to his alleged molestation of her when she was a child, and such evidence was inadmissible pursuant to either Evidence Code sections 1101 or 1108. Santos also argues the evidence was highly prejudicial pursuant to Evidence Code section 352.

#### **A. Background**

Santos filed a pretrial motion to exclude evidence of uncharged acts, particularly testimony by Areana that he allegedly molested her. The prosecution filed opposition, and argued such evidence was admissible pursuant to Evidence Code section 1108.

During the pretrial motions, the court considered the admissibility of any evidence of uncharged prior acts pursuant to section 1108. The prosecutor made an offer of proof that he intended to present two witnesses under section 1108. The first witness would be Areana S., who was Linda's older half-sister and Santos's stepdaughter. Areana was now 17 years old, but intended to testify that Santos molested her in 1990, when she was eight years old. Areana would testify that Santos removed her clothes, put saliva on his penis and her buttocks, and rubbed his penis against her buttocks and vaginal area. Areana would also testify that Santos made her perform acts of oral copulation on him. Lourdes S., the mother of both Linda and Areana, would testify that Areana told her about the incidents, they reported it to the Tulare Police Department, and a police report was filed. Lourdes decided not to pursue the case because she did not want to put Areana through the court system, and she knew that Santos was about to be sentenced to prison based on his multiple convictions for attempted kidnapping in an unrelated case. Lourdes would testify that she confronted Santos with the allegations while he was in custody on the other charges, and he initially denied it but later admitted that he touched Areana. Santos asked Lourdes to bring Areana to visit him so he could apologize to her. The prosecutor asserted all this information was in the 1990 police report.

The prosecutor argued Areana's testimony was admissible under section 1108 because Santos engaged in conduct which was "strikingly similar" to that used on Linda.

"We have two young girls under ten years old who are not penetrated, but have [Santos] rubbing his penis up against their buttocks and/or genital regions. [¶] The time frame with Areana, she described it as on several occasions, but all of them occur when she was approximately the same age as the current victim. They are so similar in conduct that it almost showed a pattern in almost identity because of the strikingly similar conduct of rubbing [his] penis up against her buttocks. The fact that he makes admissions to the child's mother strengthens this, but he wants to apologize to her."

The prosecutor also argued such evidence was relevant and very probative to establish Santos's intent to obtain sexual gratification. He conceded the evidence was damaging, but "that does not automatically exclude it." "It is similar conduct to a victim who is the approximate same age, same relationship, same subservient status, if you will, within the family to an authority figure, being a father or stepfather." "There are several characteristics that are similar. There is the close relationship. They happen when the child is secluded from others. They're strikingly similar in age."

The prosecutor stated the second witness for section 1108 evidence would be Jose S., who was Linda's half-brother and Santos's stepson. Jose was now 20 years old, and he would testify that Santos molested him when he was 12 years old. Jose would testify that he was a passenger in Santos's car when Santos fondled his body, both over and under his clothes. The prosecutor conceded that Jose's evidence was dissimilar from the other acts, but argued the incident was still admissible under section 1108 because it showed Santos's propensity to commit lewd acts toward a minor child for sexual gratification.

The prosecutor asserted both incidents were admissible under sections 1108 and 352 because when Santos spoke to Detective Martin, he admitted that he might have hugged Linda but denied that he rubbed his penis against her for sexual gratification.

Santos's counsel argued the evidence was inadmissible because it was highly prejudicial. Santos also argued that Jose's proposed testimony was not relevant to the charged offenses. Santos asserted that section 1108 merely allowed the prosecution to admit prejudicial character evidence on propensity, and the evidence should be excluded. Santos also argued the incidents occurred several years ago and were not relevant to the instant case.

The trial court held that Areana's proposed testimony was admissible pursuant to both section 1108 and section 352. The court found the probative value of Areana's testimony was substantial because it established that Santos "had in fact committed



similar acts in the past, and I believe one of the important factors to consider is the reliability of such prior alleged conduct. And some of the reliability factors here is that this matter was reported and there is a police report, which the defense has access to. So this is not something [that] comes as a surprise to a defense.” The court further found the probative value outweighed the prejudicial effect.

“Certainly there’s prejudice any time this type of evidence would be introduced against the defendant. However, the probative value outweighs that. [¶] Also, there’s not an undue consumption of time by allowing this evidence in, nor would it create a substantial danger of undue prejudice or confusing the issues or misleading the jury. [¶] So for all those factors, the Court believes that under Evidence Code Section 352 this evidence is admissible under [section] 1108.”

The court also found Areana’s testimony was admissible under Evidence Code section 1101, subdivision (b) to establish Santos’s intent, motive, and common plan and scheme. There was sufficient similarity to allow Areana’s testimony for these factors because both girls were related to Santos, in that Linda was his natural child and Areana was his stepdaughter; both girls were similar ages; and many of the lewd acts performed on both girls were similar in nature. The court held Areana’s mother could also testify as to her knowledge of the incident.

The court excluded Jose’s testimony, and found the indicia of reliability as to his evidence was not as great because there was no independent police report filed, and the court did not find similarities with Linda’s case that were substantial enough to permit its introduction. The court held that Jose’s testimony could be admissible if Santos testified and made a broad claim that he never molested anyone at all.

The prosecutor sought clarification as to the admissibility of the reasons why Santos was never charged with the molestation of Areana. The prosecutor noted that when Areana told her family and the police about Santos’s conduct, Lourdes confronted Santos while he was in custody on the unrelated kidnapping charges, and Santos said he would apologize to Areana. The family knew Santos was going to be sentenced to state

prison on these charges, and that factor was one reason they decided against putting Areana through a criminal proceeding.

The court instructed the prosecutor to exclude any evidence as to why the family did not pursue any charges against Santos based on the alleged molestation of Areana, and to exclude any reference as to Santos being sent to state prison shortly after the police report was filed. Lourdes could simply testify that she spoke to Santos about Areana's allegations, but not mention that he was in custody at the time. The court also ruled that Santos could point out that charges were never filed and he was never convicted of any offenses against Areana. However, the court reserved ruling that the circumstances of Santos's pending incarceration would be admissible if the defense claimed that Lourdes did not press charges because nothing actually happened. Santos's counsel agreed he would simply ask whether charges were filed, or whether the case ever went to trial, and simply solicit a negative answer rather than an explanation.

**B. Evidence Code section 1101**

Santos first contends the court improperly admitted Areana's testimony pursuant to Evidence Code section 1101. The admissibility of character evidence in California is generally determined pursuant to section 1101. Section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101, subdivision (b) permits the admission of uncharged acts when relevant to establish some fact other than a person's character or disposition, such as motive, intent, identity, or common scheme and plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, 400; *People v. Balcom* (1994) 7 Cal.4th 414, 422.) In addition, the admission of such evidence must be evaluated pursuant to Evidence Code section 352. The trial court must determine whether the probative value of such evidence is substantially outweighed by the

probability that its admission would create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*People v. Balcom, supra*, 7 Cal.4th at pp. 426-427.) On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

“To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]” (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403; *People v. Kraft, supra*, 23 Cal.4th at p. 1031.)

The least degree of similarity is required to establish relevance on the issue of intent. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) For this purpose, the uncharged crime need only be “sufficiently similar [to the charged offenses] to support the inference that the defendant ‘probably harbor[ed] the same intent in each instance.’ [Citations.]” (*Ibid.*)

Santos asserts the prior sexual molestation against Areana was not admissible to establish either his intent or common scheme or plan as to the molestation of Linda. We believe our reiteration of the facts surrounding these incidents is sufficient to show otherwise. (*People v. Waples, supra*, 79 Cal.App.4th at pp. 1395-1396.) In his prearrest statement to Detective Martin, appellant admitted that he might have climbed into Linda's bed and hugged her from behind, but insisted nothing inappropriate happened. Thus, Areana's testimony was relevant to establish Santos's sexual intent and common

scheme or plan to inappropriately touch two young girls who were members of his household. Santos was Areana's stepfather, and lived in the house with her. He took advantage of a position of trust and sexually molested Areana in secluded situations, after her mother left for work and when the other children were still asleep. Similarly, Santos took advantage of his position of trust as Linda's father, and sexually molested her when they were staying in a bedroom by themselves, and when her mother was not present in the house. Areana's testimony was thus relevant under section 1101, subdivision (b), and it was not prejudicial under section 352. (*People v. Branch, supra*, 91 Cal.App.4th at p. 281.)

**C. Evidence Code section 1108**

Appellant contends Areana's testimony was inadmissible pursuant to Evidence Code section 1108 and the *Falsetta* factors. As set forth above, section 1108 provides that evidence of a prior sexual offense is admissible in a prosecution for another sexual offense to prove defendant's propensity to commit such crimes. However, the trial court still retains discretion pursuant to Evidence Code section 352 to exclude such propensity evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues, or mislead the jury. (*People v. Fitch, supra*, 55 Cal.App.4th at p. 183; *People v. Soto, supra*, 64 Cal.App.4th at pp. 983-986.)

Evidence Code section 352 permits the trial court to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption. (*People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Nicolaus* (1991) 54 Cal.3d 551, 578.) "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" (*People v. Yu* (1983) 143 Cal.App.3d 358, 377; *People v. Bolin, supra*, 18 Cal.4th at p. 320.) Thus, the balancing

process mandated by section 352 requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion. (*People v. Wright, supra*, 39 Cal.3d at p. 585.)

In *People v. Falsetta, supra*, 21 Cal.4th 903, the Supreme Court explained that in considering section 1108 evidence and weighing probative value against prejudicial effect, the trial court "must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Id.* at p. 917.)

In evaluating the *Falsetta* factors, we find the trial court did not abuse its discretion in admitting Areana's testimony under section 1108. As with Linda, Areana offered compelling and detailed testimony about Santos's molestation of her when she lived in his house. The molestations occurred when she was the same age as Linda, and under similar furtive circumstances. While the incidents occurred nine or ten years prior to trial, Areana and Linda were about the same age when Santos molested them. The trial court properly excluded Jose's testimony because his proffered evidence was substantially dissimilar to the charges against Santos. However, Areana's testimony was no more inflammatory than Linda's testimony against Santos. Such propensity evidence is exactly the type of testimony contemplated by section 1108, and was not unduly prejudicial under section 352. The record demonstrates the trial court carefully balanced the probative value of the proposed propensity evidence against the potentially

prejudicial value of such evidence. (*People v. Waples, supra*, 79 Cal.App.4th at p. 1395; *People v. Yovanov, supra*, 69 Cal.App.4th at pp. 405-406; *People v. Callahan, supra*, 74 Cal.App.4th 356; *People v. Soto, supra*, 64 Cal.App.4th at pp. 986-990.)

## **VII.**

### **CALJIC Nos. 2.50.01 AND 2.50.1.**

Santos raises another issue based on the court's admission of Areana's testimony pursuant to Evidence Code section 1108. Santos asserts the jury was improperly instructed to consider Areana's testimony as propensity evidence based on a lesser standard of proof, pursuant to CALJIC Nos. 2.50.01 and 2.50.1.

#### **A. Background**

During the instructional phase, the court informed the parties that it would instruct the jury that the section 1108 evidence was only admitted against Santos and not Francisco. The parties concurred and the court modified CALJIC No. 2.50.01 accordingly. Santos did not raise any objections.

The court subsequently instructed the jury pursuant to the 1999 revision of CALJIC No. 2.50.01:

“Evidence has been introduced for the purpose of showing that the defendant Santos [C.] only engaged in a sexual offense [other] than the charge in this case. Sexual offense means in the laws of the United States that involves any of the following: One, contact without consent between any part of the defendant's body or an object and the genitals or anus of another person, or contact without consent between the genitals or anus of the defendant and any part of another person's body.

“If you find that the defendant Santos [C.] committed a prior sexual offense, you may but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offense.

“If you find that the defendant had this disposition, you may but are not required to infer that he was likely to commit and did commit the crime of which he is accused. However, if you find by a preponderance of the evidence that the

defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.

“The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.”

The court also instructed the jury pursuant to CALJIC No. 2.50.1, that the prosecutor had the burden of proving Santos committed a prior sexual offense by a preponderance of the evidence.

## **B. Analysis**

On appeal, Santos contends the court improperly instructed the jury with the 1999 version of CALJIC No. 2.50.01, regarding the use of the propensity evidence admitted under Evidence Code section 1108. Santos also contends that CALJIC Nos. 2.50.01 and 2.50.1 permit the jury to find the existence of the prior sexual assault by the lesser standard of the preponderance of the evidence, and argues the instructions allow the jury to find him guilty of the charged offense by this lesser burden of proof than beyond a reasonable doubt.

After the enactment of Evidence Code sections 1108 and 1109, several cases addressed whether the 1998 version of CALJIC No. 2.50.01 was constitutionally infirm. This court rejected the argument and held when the 1998 version of this instruction was considered together with those on reasonable doubt and the elements of the charged offense, juries were not reasonably likely to return a conviction based on an unconstitutionally lenient standard of proof or on evidence of uncharged offenses alone; hence, no error arises from the use of former CALJIC No. 2.50.01 and CALJIC No. 2.50.1. (*People v. Van Winkle, supra*, 75 Cal.App.4th at pp. 147-149; *People v. O’Neal* (2000) 78 Cal.App.4th 1065, 1078-1079; see also *People v. Waples, supra*, 79 Cal.App.4th 1389; *People v. Regalado* (2000) 78 Cal.App.4th 1056.)

In *People v. Vichroy* (1999) 76 Cal.App.4th 92, Division Two of the Second District disagreed and held that CALJIC No. 2.50.01 was constitutionally infirm because

it told the jurors “that they could convict appellant of the current charges based solely upon their determination that he had committed prior sexual offenses,” without any independent proof that he had committed the present crimes. (*Id.* at p. 99.)

In *People v. O’Neal*, *supra*, 78 Cal.App.4th 1065, this court rejected *Vichroy* and explained that, in order to apply CALJIC No. 2.50.01 as suggested by *Vichroy*, “a juror would have to conclude that a defendant could be found guilty beyond a reasonable doubt of the currently charged crime even if no evidence whatsoever had been presented to prove the elements of the charged offense.” (*People v. O’Neal*, *supra*, 78 Cal.App.4th at p. 1078; see also *People v. Regalado*, *supra*, 78 Cal.App.4th at pp. 1062-1063.)

In 1999, CALJIC No. 2.50.01 was revised to include language which directly addressed propensity evidence under section 1108, and also sought to clarify the difference between the burdens of proof. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 923-924.) *Falsetta* reviewed the 1999 revision of CALJIC No. 2.50.01 and stated: “Without passing on each specific paragraph, or considering issues not before us, we think revised CALJIC No. 2.50.01 adequately sets forth the controlling principles under section 1108.” (*Id.* at p. 924.)

The 1999 version of CALJIC No. 2.50.01 was given in the instant case, and the jury herein was specifically instructed that “if you find by a preponderance of the evidence that the defendant Santos [C.] committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.” The revised instruction appears to eliminate any possibility, however improbable, that a jury might rely on a lesser burden of proof to convict appellant of the charged offenses, and the jury was properly instructed with the 1999 version of CALJIC No. 2.50.01, in conjunction with CALJIC No. 2.50.1. (*People v. O’Neal*, *supra*, 78 Cal.App.4th at p. 1079, fn. 7; *People v. Van Winkle*, *supra*, 75 Cal.App.4th at pp. 147-148, fn. 12; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1336; *People v. Hill* (2001) 86 Cal.App.4th 273, 277.)



## **VIII.**

### **ADMISSION OF SANTOS'S SILENCE**

Santos's final issue is that the court improperly allowed the prosecutor to introduce evidence that he remained silent when Detective Martin accused him of molesting Linda. Santos asserts the court improperly found his silence was admissible as an adoptive admission, and there was insufficient foundation to introduce this evidence.

#### **A. Background**

During the pretrial motions, Santos's counsel discussed his prearrest statement to Detective Martin. Santos noted that in Martin's report, Martin stated that Santos did not deny the allegations. Santos argued that such a statement merely represented Martin's opinion about the interview, and Santos never expressly denied the allegations. Santos conceded that Martin could testify about his actual statements, but objected to any attempt by Martin to give his opinion as to whether or not Santos denied the allegations.

The prosecutor replied that according to the police report, Martin confronted Santos with Linda's specific allegations and Santos "sat there silently, obviously didn't admit to it, nor did he come out and deny it."

The court ruled that Martin could testify as to what Santos did in response to his questions, but Martin could not give his opinions or conclusions about the interrogation. Santos's counsel replied: "I believe that's all I have at this time."

At trial, Detective Martin testified about his interview with Santos, and his attempt to build a rapport with Santos. The nature of their conversation changed when Martin turned to Linda's allegations:

"Q. How did it change?

"A. At a point during the rapport building I told him that the investigation showed that there was no doubt there was inappropriate touching between him and his daughter Linda.

“Q. What was defendant Santos [C.]’s reaction when you told him that?

“[SANTOS’S COUNSEL]: *Objection, relevancy, calls for speculation.*

“THE COURT: Overruled.

“[MARTIN]: He didn’t do it. Didn’t say or do anything. He just sat there.

“Q. How long did he sit there?

“A. Oh, I gave him a few seconds to think about what I’d asked him. Then I repeated the question again--not the question, the statement again that there is no doubt that he touched her in an inappropriate matter [*sic*].

“Q. What was his response to that second statement by you?

“A. No response.

“Q. How long did you wait for him to respond?

“A. Several seconds. I didn’t wait a long time. . . . [¶] . . . [¶]

“Q. . . . You said you made the statement to him two times that the evidence -- the investigation showed there was inappropriate touching, correct?

“A. Correct.

“Q. And the second time, again, no response. Do you remember what the next question was you asked of Santos [C.]?

“A. ‘How do you think it happened?’

“Q. Did he have a response?

“A. I don’t recall. I don’t believe there was one.” (*Italics added.*)

On redirect examination, the prosecutor again asked Detective Martin about Santos’s reactions during the interview:

“Q. When you were talking with Santos [C.], the first two times you asked him about inappropriate touching and you accused him, he had absolutely no response?

“A. No response.

“[SANTOS’S COUNSEL]: Objection, vague, as to what point he’s asking the question.

“THE COURT: Sustained.

“[THE PROSECUTOR]: The very first two times – you testified earlier there were two times that you accused Santos [C.] and you told him the investigation shows there’s been inappropriate touching of his daughter Linda. The very first time that was brought up, there was no response; is that correct?

“A. Correct.

“Q. And you asked the same question on the heels of that again, with no response?

“A. Correct.

“[SANTOS’S COUNSEL]: Objection, no foundation as to when the second question was being asked.

“THE COURT: He said ‘on the heels.’ I think that means immediately after?

“[THE PROSECUTOR]: Yes.

“[MARTIN]: Correct.”

In the instructional phase, the court instructed the jury as to adoptive admissions, pursuant to CALJIC No. 2.71.5:

“If you should find from the evidence that there was an occasion when a defendant under conditions which reasonably afforded him an opportunity to reply, failed to make a denial in the face of an accusation expressed directly to him, or in his presence charging him with the crime for which this defendant now is on trial or tending to connect him with its commission, and that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true.

“Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it.

“Unless you find that a defendant’s silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard that statement.”

**B. Adoptive Admissions**

Santos contends the court improperly allowed Detective Martin to testify to his silence when accused with molesting Linda. Santos argues this evidence was inadmissible as an adoptive admission because it violated his Fifth Amendment privilege against self-incrimination, and there was an insufficient foundation to introduce this evidence.

We first note that Santos’s only objection to this evidence was based on relevancy and speculation. As discussed above, a defendant’s objection on relevancy grounds does not preserve an objection on any other ground. (Evid. Code, § 353; *People v. Visciotti*, *supra*, 2 Cal.4th at pp. 51-52.) The lack of a specific objection on a ground later urged on appeal precludes consideration of the defendant’s claim that the evidence was improperly admitted. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.) Santos did not object based on lack of foundation, inadmissible hearsay, or that his silence violated his Fifth Amendment right against self-incrimination. In contrast to Francisco, Santos did not request a section 402 hearing to consider the admissibility of Detective Martin’s testimony, even though Santos was well aware of the nature of Martin’s anticipated testimony. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1172.) His failure to lodge the appropriate objections should be considered as waiver of his appellate claims. However, we will endeavor to address his contentions to avoid the inevitable ineffective assistance claim raised in a petition for writ of habeas corpus. (See, e.g., *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1840-1841.)

We will thus consider whether Detective Martin's testimony was admissible as an adoptive admission. "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Under this provision, "If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." (*People v. Preston* (1973) 9 Cal.3d 308, 313-314; see also *People v. Silva* (1988) 45 Cal.3d 604, 624; *People v. Riel* (2000) 22 Cal.4th 1153, 1189.) The Fifth Amendment privilege against self-incrimination does not on its face apply to commentary on defendant's nonassertive conduct prior to trial, absent a showing that such conduct was in assertion of the privilege to remain silent. (*People v. Wilson* (1965) 238 Cal.App.2d 447, 455-461; *People v. Preston, supra*, 9 Cal.3d at p. 315.)

"For the adoptive admission exception to apply, ... a direct accusation in so many words is not essential." (*People v. Fauber* (1992) 2 Cal.4th 792, 852.) "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*Estate of Neilson* (1962) 57 Cal.2d 733, 746; *People v. Riel, supra*, 22 Cal.4th at p. 1189.)

"To warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair

opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

There was sufficient foundation for the court to permit the jury to consider, as an adoptive admission, Detective Martin's testimony as to Santos's reaction when confronted with Linda's accusations. Martin's statement amount to an accusation that Santos molested Linda. The circumstances of Martin's statement supported the inferences that Santos heard and understood the statements and had the opportunity to deny them, and that he chose to remain silent in the face of the accusatory statements. In addition, the court correctly instructed the jury on the consideration of the proffered evidence for an adoptive admission. (See *People v. Medina* (1990) 51 Cal.3d 870, 891.)

### **C. Fifth Amendment issues**

While the testimony is clearly admissible as an adoptive admission, it is a more difficult question as to whether Santos's silence, in the face of an accusation from a law enforcement officer, amounted to his invocation of his Fifth Amendment right against self-incrimination. If a defendant remains silent in the face of an accusatory statement from a person *other than a police officer*, his silence "'lead[s] reasonably to the inference that he believes the accusatory statement to be true.'" (*People v. Silva, supra*, 45 Cal.3d at p. 624.) The Fifth Amendment privilege against self-incrimination does not on its face apply to commentary on defendant's nonassertive conduct prior to trial, absent a showing that such conduct was an assertion of the privilege to remain silent. (*People v. Wilson, supra*, 238 Cal.App.2d at pp. 455-461; *People v. Preston, supra*, 9 Cal.3d at p. 315.) Thus, the adoptive admission exception to the hearsay rule applies only under circumstances "which do not lend themselves to an inference that [defendant] was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution." (*People v. Preston, supra*, 9 Cal.3d at pp. 313-314; *People v. Riel, supra*, 22 Cal.4th at p. 1189.)

The admissibility of a defendant's silence, both before and after the advisement of *Miranda* warnings, has been discussed in a series of United States Supreme Court opinions. In *Griffin v. California* (1965) 380 U.S. 609, the court held that a defendant's choice not to testify at trial and remain silent cannot be used against him by either the prosecutor in closing argument, or the court in jury instructions. (*Id.* at p. 610; *People v. Jones* (1997) 15 Cal.4th 119, 170.)

In *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the court excluded a defendant's post-*Miranda* silence:

“The warnings mandated by ... [*Miranda*] ... require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights.... *Miranda* warnings contain no express assurance that silence will carry no penalty, [however,] such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.” (*Doyle, supra*, 426 U.S. at pp. 617-618.)

*Doyle* thus prohibits the admission of a defendant's post-*Miranda* silence because the warnings themselves carry the implicit assurance that any silence will not be accompanied by a penalty. (*Doyle, supra*, 425 U.S. at p. 618; *People v. Earp* (1999) 20 Cal.4th 826, 856.)

In *Jenkins v. Anderson* (1980) 447 U.S. 231 (*Jenkins*), defendant failed to speak before he was taken into custody and given *Miranda* warnings. *Jenkins* held that defendant's trial testimony could be impeached with his pre-*Miranda*, prearrest silence. (*Jenkins, supra*, 447 U.S. at pp. 236-238.)

“Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent

statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, ‘[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.’ [Citation.] [¶] Thus, impeachment follows the defendant’s own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant’s credibility.” (*Jenkins, supra*, 447 U.S. at p. 238, quoting *Brown v. United States* (1958) 356 U.S. 148, 156.)

*Jenkins* also concluded the “fundamental unfairness present in *Doyle* is not present in this case.” (*Jenkins, supra*, 447 U.S. at p. 240.) Defendant’s failure to speak occurred before he was taken into custody and given *Miranda* warnings, and “no governmental action induced [defendant] to remain silent before arrest.” (*Id.* at p. 240.)

However, *Jenkins* declined to address the admissibility of a defendant’s prearrest, pre-*Miranda* silence, in situations other than impeachment:

“Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silence.” (*Jenkins, supra*, 447 U.S. at p. 236, fn. 2.)

In his concurrence in *Jenkins*, Justice Stevens wrote that he would have rejected the defendant’s Fifth Amendment claim simply because the privilege against compulsory self-incrimination is irrelevant to a citizen’s decision to remain silent when he is under no official compulsion to speak. (See *Jenkins, supra*, 447 U.S. at p. 241 (conc. opn. of Stevens, J.).)

“The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. ...When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the



privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.” (*Jenkins, supra*, 447 U.S. at pp. 243-244 (conc. opn. of Stevens, J.), fn. omitted.)

In *Fletcher v. Weir* (1982) 455 U.S. 603, the court addressed the admissibility of a defendant’s silence, which occurred postarrest but prior to the advisement of the *Miranda* warnings. The court rejected the extension of *Doyle* to such a situation, and clarified that *Doyle* applied only when *Miranda* warnings have first been given. (*Fletcher v. Weir, supra*, 455 U.S. at p. 605-606.) The court held that there is no *Doyle* violation when a defendant is cross-examined about his postarrest silence where no *Miranda* warnings had been given following the arrest.

“In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant’s own testimony.” (*Fletcher v. Weir, supra*, 455 U.S. at p. 607.)

Prior to the enactment of Proposition 8, the California courts adopted a more expansive reading of *Doyle* based on independent state grounds, which prohibited cross-examination or commentary on a defendant’s postarrest silence *whether Miranda warnings were given or not*. (*People v. O’Sullivan* (1990) 217 Cal.App.3d 237, 244; *People v. Delgado, supra*, 10 Cal.App.4th at p. 1841.) The “California rule” was stated in *People v. Free* (1982) 131 Cal.App.3d 155:

“[P]ostarrest silence may not be commented upon if it follows a *Miranda* warning. The same rule may apply if there is no *Miranda* warning in order to foreclose inducement of police to dispense with a *Miranda* advisement .... Prearrest silence may be commented upon unless the court finds the silence was an invocation of Fifth Amendment rights. Prearrest silence in circumstances in which there is no inference of a reliance on the

right to silence may be used to impeach by way of cross-examination.”  
(*People v. Free, supra*, 131 Cal.App.3d at p. 165.)

In 1982, however, the enactment of Proposition 8 resulted in the application of the exclusionary rule only to matters for which federal law prohibits admission. (*People v. Delgado, supra*, 10 Cal.App.4th at p. 1841.) As a result of the enactment of Proposition 8, evidence of a defendant’s silence may be excluded only if application of the exclusionary rule is compelled by federal law. (*People v. O’Sullivan, supra*, 217 Cal.App.3d at p. 240.)

Thus, this state now follows the federal rule as to the introduction of evidence of defendant’s silence. Once an accused has been given the *Miranda* warnings, his post-*Miranda* silence may not be used to impeach an explanation subsequently offered at trial. (*Doyle, supra*, 426 U.S. at p. 619; *People v. O’Sullivan, supra*, 217 Cal.App.3d at p. 244; *People v. Medina, supra*, 51 Cal.3d at p. 890.) In contrast, the defendant’s pre-*Miranda*, prearrest silence is admissible for purposes of impeachment. (*Fletcher v. Weir, supra*, 455 U.S. at p. 607; *People v. Earp, supra*, 20 Cal.4th at p. 856; *People v. Delgado, supra*, 10 Cal.App.4th at p. 1842; *People v. O’Sullivan, supra*, 217 Cal.App.3d at p. 244.)

If Santos had testified at trial and denied the charges, he could have been impeached with evidence of his prearrest, pre-*Miranda* silence which occurred during his interview with Detective Martin. (*People v. Earp, supra*, 20 Cal.4th at p. 856; *People v. Delgado, supra*, 10 Cal.App.4th at pp. 1842-1843.) The instant case, however, involves a situation when the prosecution introduced evidence, in its case-in-chief and on direct examination, that Santos remained silent during a prearrest, pre-*Miranda* interview, when faced with the accusation of molesting his daughter.

There is no California case which addresses the issue left unanswered in *Jenkins*, i.e., whether a defendant’s prearrest, pre-*Miranda* silence can be used in the prosecution’s case-in-chief. However, the Ninth Circuit has addressed this issue. In *United States v. Giese* (9th Cir. 1979) 597 F.2d 1170, the court rejected defendant’s argument that the use

of his prearrest silence violated his privilege against self-incrimination: “Neither due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior.” (*Id.* at p. 1197.)

In *U.S. v. Oplinger* (9th Cir. 1998) 150 F.3d 1061, the Ninth Circuit acknowledged that *Jenkins* left the issue undecided, but cited its previous ruling in *Giese* and Justice Stevens’s concurring opinion in *Jenkins*, and held that evidence of the defendant’s pre-*Miranda*, prearrest silence did not violate defendant’s privilege against self-incrimination under the Fifth Amendment or his right to due process under the Fourteenth Amendment. (*U.S. v. Oplinger, supra*, 150 F.3d at p. 1067.) *Oplinger* also rejected the application of *Doyle* to a defendant’s pre-*Miranda*, prearrest silence because “[t]here is no governmental inducement to remain silent and no promise that an individual’s silence will not be used against him; therefore, the ‘fundamental unfairness’ present in *Doyle* is notably absent prior to custody.” (*U.S. v. Oplinger, supra*, 150 F.3d at p. 1067, fn. 5.)

The Fifth and Eleventh Circuits have agreed with the Ninth Circuit’s position on this issue. In *U.S. v. Zanabria* (5th Cir. 1996) 74 F.3d 590, the court held that although the Fifth Amendment protects against compelled self-incrimination, it “does not . . . preclude the proper evidentiary use and prosecutorial comment about every communication or lack thereof by the defendant which may give rise to an incriminating inference.” (*Id.* at p. 593, italics omitted.) In *U.S. v. Rivera* (11th Cir. 1991) 944 F.2d 1563, 1568, the court similarly held: “The government may comment on a defendant’s silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings.”

The First, Sixth, Seventh, and Tenth Circuits have taken a different position, and held that prearrest silence comes within the proscription against commenting on a defendant’s privilege against self-incrimination laid down in *Griffin v. California, supra*, 380 U.S. 609. (*U.S. v. Oplinger, supra*, 150 F.3d at p. 1067, citing *U.S. v. Burson* (10th

Cir. 1991) 952 F.2d 1196, 1200-1201; *Coppola v. Powell* (1st Cir. 1989) 878 F.2d 1562, 1565-1568; *U.S. ex rel. Savory v. Lane* (7th Cir. 1987) 832 F.2d 1011, 1018.)

In *Oplinger*, the Ninth Circuit commented on these contrary opinions as follows:

“In our view, the position those courts have endorsed is simply contrary to the unambiguous text of the Fifth Amendment, which plainly states that ‘[n]o person ... shall be compelled in any criminal case to be a witness against himself.’ U.S. Const. amend. V (emphasis added). The Supreme Court has ‘never on any ground ... applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which ... did not involve compelled testimonial self-incrimination of some sort.’ *Fisher v. United States*, 425 U.S. 391, 399, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).” (*U.S. v. Oplinger*, *supra*, 150 F.3d at p. 1067, italics omitted.)

*Oplinger* also noted crucial distinctions in the facts of the contrary cases: “Notably, perhaps, in all these cases, the party seeking to assert the privilege against self-incrimination *was questioned by a government official*. [Citations.] Such was not the case here. There was no government involvement in the meeting between Oplinger and his employers; it was strictly a matter of private concern between private individuals.” (*U.S. v. Oplinger*, *supra*, 150 F.3d at p. 1067, fn. 6, italics added.)

More recently, in *Combs v. Coyle* (6th Cir. 2000) 205 F.3d 269, the Sixth Circuit held that the defendant’s prearrest silence was not admissible as substantive evidence of guilty. *Combs* reviewed the conflicting opinions of the other circuits, and held:

“We agree with the reasoning expressed in the opinions of the Seventh, First, and Tenth Circuits, and today we join those circuits in holding that *the use of a defendant’s prearrest silence as substantive evidence of guilt violates the Fifth Amendment’s privilege against self-incrimination*. Like those circuits, we believe ‘that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime.’ [Citation.] The Supreme Court has given the privilege against self-incrimination a broad scope, explaining that ‘[i]t can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.’ [Citations.] In a

prearrest setting as well as in a post-arrest setting, it is clear that a potential defendant's comments could provide damaging evidence that might be used in a criminal prosecution; the privilege should thus apply." (*Combs v. Coyle, supra*, 205 F.3d at p. 283, *italics added*.)

However, *Combs* drew the additional distinction that even assuming the Fifth Amendment was inapplicable to precustody context, the privilege was still applicable to the defendant therein because the court agreed defendant was in custody at the time. (*Combs v. Coyle, supra*, 205 F.3d at p. 284.)

We decline to enter into the thicket of federal opinions to resolve the dispute among the circuit courts, or to adopt one of their positions for this state. Instead, we will assume the trial court improperly allowed Detective Martin to testify about Santos's prearrest silence, and improperly allowed the jury to consider his silence as an adoptive admission. We must thus determine whether the trial court's erroneous decision to admit evidence of Santos's silence, in the prosecution's case-in-chief, was harmless beyond a reasonable doubt, pursuant to *Chapman v. California* (1967) 386 U.S. 18, 24, which is the applicable standard in cases of *Doyle* error. (*People v. Earp, supra*, 20 Cal.4th at p. 858; *U.S. v. Kallin* (9th Cir. 1995) 50 F.3d 689, 693.)

As discussed above, Linda's testimony provided credible, plausible, and overwhelming evidence of Santos's guilt. While Detective Martin testified about Santos's silence in the face of his accusation, he also testified that Santos repeatedly denied sexually molesting his daughter. In addition, Martin testified that Santos admitted that he climbed into Linda's bed and hugged her from behind, but Santos claimed he did not touch her in an inappropriate manner. Areana's testimony, which constituted admissible propensity evidence pursuant to Evidence Code section 1108, established Santos's motive and intent to commit an inappropriate touching. We thus conclude that given the entirety of the record, any error in admitting evidence of Santos' silence was harmless beyond a reasonable doubt.

## **IX.**

### **CALCULATION OF SANTOS'S SENTENCE**

We have discovered a sentencing error in the third strike term imposed against Santos. The amended information alleged that Santos suffered three prior serious and/or violent felony convictions within the meaning of the three strikes law, and three prior serious felony convictions within the meaning of Penal Code section 667, subdivision (a). Santos waived a jury trial, and the court found all special allegations to be true. Santos subsequently filed a motion for the court to dismiss the prior convictions which served both as strikes, and as section 667, subdivision (a) serious felony enhancements.

At Santos's sentencing hearing, the prosecution opposed Santos's motion to dismiss any of the special allegations, and argued the third strike term was appropriate based on the current offense and his prior convictions.

The court denied Santos's motion to dismiss the prior strike convictions, and imposed the third strike sentence of 25 years to life for count III, commission of a lewd or lascivious act. However, the court completely ignored the three prior serious felony enhancements, which it had previously found to be true, pursuant to section 667, subdivision (a).

The probation report reflects that the three prior serious felony enhancements were based on three convictions for attempted kidnapping in 1990, which were brought and tried in the same proceeding, in Tulare County Superior Court case No. 28478.

An issue letter was sent to the parties as to whether the trial court failed to impose sentence on at least one of the prior serious felony enhancements. Appellant and respondent agree the three prior convictions for attempted kidnapping were brought and tried in the same proceeding. Thus, Santos would only face a single five-year enhancement because the three prior convictions were not brought and tried separately. (Pen. Code, § 667, subd. (a)(1); *People v. Dotson* (1997) 16 Cal.4th 547, 553.)

Appellant asserts the trial court had discretion to stay the section 667, subdivision (a) enhancement, and the five-year term cannot be imposed. However, where a person has been convicted of a serious felony in the current case, and it has been pleaded and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), the trial court must impose a consecutive five-year term for each such prior conviction brought and tried separately. The trial court has no discretion and the sentence is mandatory. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045; *People v. Purata* (1996) 42 Cal.App.4th 489, 498.) A trial court's failure to impose the five-year enhancement results in an unauthorized sentence, which can be corrected at any time when brought to the appellate court's attention. (Pen. Code, § 1260; *People v. Purata, supra*, 42 Cal.App.4th at p. 498.)

In the instant case, the trial court should have imposed a consecutive five-year term to Santos's sentence pursuant to section 667, subdivision (a)(1). We will modify the judgment as to Santos accordingly.

#### **DISPOSITION**

The judgment as to appellant Francisco C. is affirmed.

The judgment as to appellant Santos C. is modified to impose a five-year enhancement pursuant to Penal Code section 667, subdivision (a), consecutive to the term imposed in count III. The superior court is directed to prepare a modified abstract of judgment as to Santos C. reflecting such change in the sentence and forward it to the Department of Corrections.

As so modified, the judgment as to appellant Santos C. is affirmed.

\_\_\_\_\_  
Harris, J.

WE CONCUR:

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Ardaiz, P.J.

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Dibiaso, J.